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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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No.

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JOSEPH B. CRAWFORD, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The 2,974 Petitioners represented herein respectfully pray that a writ of certiorari issue to review the judgment entered against them by the United States Court of Claims on March 17, 1967.

### OPINION BELOW

The Opinion of the Court of Claims is not yet officially reported. It is reported unofficially at 376 F. 2d 266, and is reproduced in Appendix A to this Petition.

## JURISDICTION

On March 17, 1967, the Court of Claims issued an opinion and judgment denying Petitioners' motion for summary judgment, granting the motion of the United States for summary judgment, and dismissing Petitioners' actions. Petitioners' timely motion for rehearing was denied by the Court of Claims on July 20, 1967. On October 16, 1967, Chief Justice Warren issued an Order extending the time within which this Petition might be filed to and including November 10, 1967. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1255(1).

## QUESTIONS PRESENTED

1. Under an Act of Congress directing the Secretary of Defense to fix rates of compensation for overseas teachers "in relation to the rates of basic compensation for similar positions in the United States," did the Secretary have any lawful authority to fix such rates *out* of relation to the rates of basic compensation for similar positions in the United States, *solely* on the basis of his determination that the annual amounts appropriated for overseas schools of the Department of Defense were insufficient to pay the teachers' salaries at rates which would conform to the standard specified by Congress, as a result of his other expenditures from those appropriations?

2. What standards should be applied to determine whether Congress, in an appropriation act, has altered a previously enacted substantive statute governing rates of compensation?

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are set out and cited in Appendix B, *infra,* as follows: the Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959) p. 28a; the Department of Defense Appropriation Acts for the fiscal years 1953-1966, p. 29a; the Department of Defense Directive 1400.13, issued on October 15, 1959, p. 30a; and the Department of Defense Salary Determination Procedures, of August 31, 1960, pp. 30a-34a.

## STATEMENT OF THE CASE

This case brings to this Court a controversy which has been raging for almost a score of years concerning the treatment of approximately 20,000 teachers who are or have been employed in schools operated overseas by the Department of Defense ("DoD" hereinafter) for the education of children of United States Government personnel stationed abroad.

Specifically, this case involves claims for compensation under the Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91 (1959), set out in pertinent part in Appendix B, p. 28a, *infra,* ("the Act" hereinafter). An outline of the background of the Act is a necessary prelude to a discussion of its provisions, on the one hand, and its administration by the Secretary of Defense, on the other.

### A. Background

Schools for the children of United States Government personnel stationed abroad were first established by DoD shortly after World War II. Prior to 1959, there was no special legislation concerning those schools, other than the annual DoD appropriation acts

which simply authorized the expenditure of funds "when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents." *E.g.*, 66 Stat. 533, § 616 (1952).

Teachers for those schools were primarily recruited in the United States and were "required to have educational qualifications and credentials on a par with those required in urban school districts in the United States with 100,000 or more population."[1] Their duties and responsibilities were comparable to those of teachers in similar positions in the United States.[2]

Until 1959, however, the terms and conditions of employment of these overseas teachers differed markedly from those applicable in United States school systems. Since there was no special legislation governing their pay and conditions of employment, overseas teachers were subject to the general civil service statutes and regulations. They were, for example, classified for pay purposes as "GS-7" under the Classification Act of 1949, as amended, 5 U.S.C. § 1071 *et seq.* and their leaves were governed by the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. §§ 2061-2066.[3] These general statutes, as applied to them, resulted in various inequities in relation to domestic teachers in similar positions. For example,

> "* * * they were not paid for the Thanksgiving, Christmas, and Easter recess periods, nor were they

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[1] Defendant's Statement Of Facts In Lieu Of A Response To Plaintiffs' Motion For Call And Request For Admissions, accepted as a stipulation of fact in the Court below ("Statement of Facts" hereinafter), p. 4.

[2] *Id.* at pp. 4-5.

[3] *Id.* at p. 3.

paid for the summer vacation period; they were paid approximately 9/12 to 10/12 of the General Schedule (GS) rates for GS-7's. This caused dissatisfaction on the part of the teachers because teachers in the United States who do not work during similar recess and vacation periods are paid full school year salaries without deductions for such recess and vacation periods." (Statement of Facts, p. 4)

After these problems were brought to the attention of the Congress by a House Committee investigation of the personnel problems in overseas schools conducted in 1955[4] and by presentations at Congressional hearings by the National Education Association and the DoD itself,[5] legislation was proposed to correct these inequities. This proposal, which ultimately became the Act, received universal support, including that of the DoD itself.[6]

In opening the hearings before the House Subcommittee on Civil Service, the Chairman stated:

"The legislation before the subcommittee will provide an improved system of personnel administration and compensation for school teachers and certain school officers and other employees of the dependents schools of the Department of Defense in foreign areas.

"The new system will be comparable to those found in the majority of the public primary and

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[4] See H. Rep. No. 2109, 84th Cong., 2d Sess. (1956).

[5] *Hearings on Department of Defense Appropriations for 1959 before Subcommittee of House Committee on Appropriations,* 85th Cong., 2d Sess., pp. 519, 536-546 (1958).

[6] See *passim, Hearings on H.R. 1871 Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. (1959).

secondary school jurisdictions in the United States, including the District of Columbia * * * .

* * *

"Individuals in overseas teaching positions will be exempted from the Classification Act of 1949 and from certain other civil service and personnel procedures which are not appropriate for their positions. Their compensation will be fixed by the heads of the respective military departments, subject to general regulations of the Secretary of Defense. Rates of pay will be established in relation to the rates for similar positions in the United States, not exceeding the maximum rates for teaching positions with comparable levels of responsibility in the District of Columbia schools." *Hearings on H.R. 1871 before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. pp. 5-6 (1959).[7]

The House Committee Report summarized the Congressional purpose of the Act in the following terms:

"The purpose of this legislation is to provide a system of personnel administration for school teachers and certain school officers and other employees of the dependents schools of the Department of Defense in overseas areas, comparable to the type of system found in the majority of the public, primary and secondary school jurisdictions of the United States. The proposed system will eliminate many of the difficulties resulting from the present application to such personnel of certain civil service rules and regulations, the Classifica-

[7] Similar statements were made, during the course of these hearings, by Congressman Broyhill (*id.* at p. 9), Stephen S. Jackson, Deputy Assistant Secretary of Defense for Manpower (*id.* at pp. 11-12), Congressman Foley (*id.* at p. 25), Kent Rossier, President of the Overseas Teachers Association (*id.* at pp. 28-29), Mary Hoague, Legislative Chairman of the Overseas Teachers Association (*id.* at p. 35).

tion Act of 1949, and the Annual and Sick Leave Act of 1951." H. Rep. No. 357, 86th Cong., 1st Sess., p. 1 (1959).

The intention of the Act was thus plainly to eliminate the disparities in the compensation and other treatment of overseas teachers in relation to teachers in the United States.

### B. The Act

The provisions of the Act carried out the Congressional intention. In most pertinent part, the Act provided the following substantive standard critical to this case:

> "The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States * * * ."

In addition, the Act provided that:

> "* * * the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this Act. Such regulations shall govern—
>
> * * *
>
> "(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States; * * *."[8]

There was nothing equivocal or qualified on the face of the Act with respect to the Government's obligation to pay rates of basic compensation in relation to those for similar positions in the United States. The Act

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[8] Sections 5(c) and 4(a)(2) of the Act, set out in Appendix B, p. 28a, *infra*.

contained no suggestion of any limitation based upon the amounts which Congress might annually appropriate or the DoD might annually desire to expend on overseas teachers' salaries.

### C. The DoD Administration of the Act

Notwithstanding the clear substantive standard established by Congress in the Act, the DoD elected not to pay the overseas teachers rates fixed in relation to the rates for similar positions in the United States. Rather, the DoD fixed rates in relation to a figure which appeared in the annual DoD appropriation acts concerning the average cost per pupil in the overseas schools.

#### 1. The Per Pupil Limitation

The figure which appeared in the DoD appropriation acts has been referred to as the "per pupil limitation." It found its origin in the DoD appropriation act for the fiscal year 1953 in the following language:

> "Appropriations for the Air Force and the Army for the current fiscal year shall be available for expenses in connection with * * * primary and secondary schooling for dependents of military and civilian personnel of the Department of Defense residing on military installations or stationed in foreign countries in amounts not exceeding an average of $225 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents." 66 Stat. 533, § 616 (1952).

While the amount of the limitation has varied from $225 for fiscal 1953 to $455 for fiscal 1966, the language

of the "per pupil limitation" has been substantially identical since 1953.

In practice, the per pupil limitation did not extend to all costs.[9] The appropriation acts themselves did not specify which items of cost were chargeable against the limitation. Nor did they specify how much of the amount appropriated could or should be allocated by DoD to any particular item of expense. Indeed, there was even disagreement among the military services as to precisely which costs were chargeable to the limitation.[10] Teachers' salaries, however, were always charged by DoD against the limitation.

Prior to the passage of the Act, when overseas teachers were paid in accordance with the Classification Act of 1949, their salaries were never reduced or adjusted in order to meet the exigencies of the per pupil limitation. DoD never asserted it had any discretion to pay teachers on any basis other than the substantive compensation standard directed by the Congress.[11] DoD found solutions through means or economies other than reducing or adjusting the salaries of overseas

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[9] See opinion of Court of Claims in this case, at p. 4a, *infra;* Department of Defense Instruction 1342.5, "Elements of Cost for Education of Dependents Overseas, and Computation of Costs Chargeable to Per Pupil Limitation," April 10, 1964, superseding DoD Instruction 1342.5, "Charges to the Per Pupil Limitation for Education of Dependents Overseas," October 28, 1957, Exhibit B-1, Defendant's Opposition To Plaintiffs' Motion For Summary Judgment in the Court below. "Funds made available on the basis of the per pupil limitation represent only a portion of the total cost of the program." H. Rep. No. 1329, 88th Cong., 2nd Sess., p. 27 (1964).

[10] H. Rep. No. 439, 88th Cong., 1st Sess., pp. 28-29 (1963).

[11] Supplement to Defendant's Statement of Facts, filed December 6, 1965.

teachers, whenever practical budgetary problems developed because of the per pupil limitation.

**2. The DoD Regulations Under the Act**

In the original DoD Regulations promulgated in October 1959, a few months after the Act became law, the per pupil limitation was not mentioned. The express direction of Congress that the teachers shall be paid in relation to similar salaries in the United States was recognized in the following language:

> "Rates of basic compensation for teaching positions will be fixed by the Secretaries of the military departments in relation to rates of basic compensation for similar positions in the continental United States, exclusive of Alaska and Hawaii * * *." [12]

In January 1960, DoD issued an initial salary schedule which purported to be based on the average of salaries in 33 selected urban school districts in the United States and thus to be in accord with the foregoing Regulations and the Act. In fact, however, this schedule was "adjusted in consideration of the need to stay within the established per pupil limitation, contained in the Defense Appropriation Act * * *." [13]

Thereafter, pursuant to the direction of Congress,[14] the DoD held a series of conferences with representa-

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[12] DoD Directive 1400.13, as issued October 15, 1959, Exhibit F, Defendant's Opposition To Plaintiffs' Motion For Summary Judgment.

[13] Affidavit of Edward A. Sompayrac, Exhibit C, Defendant's Opposition To Plaintiffs' Motion For Summary Judgment, p. 5.

[14] "It is the committee's understanding and expectation that, in the drafting of these regulations, the appropriate officials of the department will consult the representatives of the Overseas Teachers Association and give full consideration to the advice of these people to obtain the benefit of their practical, on-the-spot knowledge of many of the operating problems in the oversea schools." H. Rep. No. 357, 86th Cong., 1st Sess., p. 4 (1959).

tives of the Overseas Education Association for the purpose of developing the standards for the establishment of teachers' salaries in the future; and the DoD then promulgated Salary Determination Procedures which provided for an annual review of the salary schedule, in accordance with the Government's customary practice "when wage schedules are administratively determined and related to prevailing rates * * * ." It also provided a specific formula for translating the "in relation to" standard into precise dollar salary figures.[15]

To this extent, again, the Regulation was in harmony with the Act. But, again, the DoD Regulation did not leave overseas teachers' salaries fixed in conformity with the Act, but established them as the DoD safety valve in the event budgetary difficulties should develop, by providing that the salaries determined pursuant to

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[15] This formula provided:

"(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

"(b) The beginning salary step (step (a)) of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

"(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars."

Teacher salary data compiled by the National Education Association, showing the rates referred to, are available annually and are "factual and authoritative". Statement of Facts, pp. 6-7, and Exhibit C thereto.

the "in relation to" substantive standard would be adjusted on the basis of the per pupil limitation:

> *"When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year."* [16] (Emphasis in original.)

Because the DoD proceeded to establish overseas teachers' salaries in accordance with DoD appropriations rather than in relation to salaries for similar teaching positions in the United States, the salaries of the overseas teachers fell further and further behind those of teachers in similar positions in the United States. The Table set out in Appendix C, p. 35a, *infra,* demonstrates the manner in which this gap widened.

As this Table demonstrates, the beginning salary for overseas teachers ran behind by $229 for the 1960-61 School Year and by the following respective increasing amounts for each successive School Year: $389; $484; $528; and $685. Moreover, the annual salary increments of the overseas teachers were inferior in relation to similar teachers in the United States in both amount ($185 as contrasted with higher amounts rang-

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[16] In a comment immediately following this statement, DoD elucidated as follows:

> "COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. *Final determination of the adjustment, therefore, should await decision on the per pupil limitation."* (Emphasis added.)

ing up to $255) and number (10 as contrasted with 12 or 13).[17]

During this same period, Congress enacted a number of pay raise statutes for Government employees covered by the Classification Act; and as a result, the salaries of overseas teachers fell behind those of Government employees generally by a progressively increasing margin. They likewise fell far behind the salaries of their fellow employees in the overseas schools, such as principals and secretarial and clerical employees, whose salaries were governed by the Classification Act and which DoD did not attempt to "adjust" on the ground of budgetary limitations. Indeed, as a consequence of the DoD administration of the Act, overseas teachers were paid less than what they would have been paid if the Act had never been passed[18]—an anomalous and ironic result under a statute which Congress passed precisely to remedy inequitable salary practices.

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[17] It is interesting to note that in School Year 1959-1960, the salaries of overseas teachers were approximately in relation to those in the United States School Districts with 100,000 or more population. The starting rate for overseas teachers was $4,050 (see Exhibit A, Part 1, p. 1 to Statement of Facts). The equivalent United States salary was $4,070. See p. 35a, *infra*.

[18] The following table shows the successive increases in the GS-7 starting rate provided by amendments to the Classification Act after the 1959 Act was passed:

| Salary Increase Statute | Effective Date | GS-7 Starting Rate |
|---|---|---|
| P.L. 86-568, § 112(b), 74 Stat. 298 | Jul. 1960 | $5,355. |
| P.L. 87-793, § 602(b), 76 Stat. 843 | Oct. 1962 | $5,540. |
| P.L. 87-793, § 602(b), 76 Stat. 843 | Jan. 1964 | $5,795. |
| P.L. 88-426, § 102(b), 78 Stat. 400 | Jul. 1964 | $6,050. |
| P.L. 89-301, § 2(b), 79 Stat. 1111 | Oct. 1965 | $6,269. |
| P.L. 89-504, § 102(b), 80 Stat. 288 | Jul. 1966 | $6,451. |

### D. The 1966 Legislation

By 1966, the situation caused by the DoD administration of the Act had become intolerable. As the House Committee on Post Office and Civil Service noted:

> "The Committee on Post Office and Civil Service is deeply concerned at the treatment that has been accorded the overseas school teachers—a concern shared, it is believed, by many other Members of Congress—particularly in view of *the obvious failure to administer the salary provisions of Public Law 86-91 as they were intended and expected by the committee and the Congress to be administered. Without attempting to place the blame, and whether it be due to administrative unwillingness to shoulder the burden of obtaining necessary funds or disagreement with the policies of Public Law 86-91,* it certainly is essential that the problem be resolved without further delay." H. Rep. No. 519, 89th Cong., 1st Sess., pp. 3-4 (1965) (emphasis added).

Accordingly, the Committee reported H.R. 6845, which ultimately became Public Law 89-391. The purpose of this new Act was to

> "establish a positive, reasonable, and fully effective legislative policy with respect to rates of compensation which shall be paid to teachers in the overseas dependents school system of the Department of Defense, under which policy the Department of Defense and the three military departments shall and must pay such teachers salary rates equal to the average range of salaries paid teachers having comparable levels of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. This policy, and the mandatory payment of such equal salary rates, is *consistent with, and will strengthen, the policy*

*laid down by the Congress in the enactment of the Defense Department Overseas Teachers Pay and Personnel Practices Act (Public Law 86-91), which thus far has not been effectuated in accordance with congressional intent."* *Id.* at p. 2 (emphasis added).

This Report continued:

"The Post Office and Civil Service Committee and the Congress understood that in enacting Public Law 86-91 they were providing a firm and reasonable formula for the payment of appropriate salaries to overseas teachers. That understanding has not proved out. H.R. 6845 provides a standard which, although variable in amount, is positive because the precise dollar amounts in question are readily ascertainable. In fact, the currently applicable dollar amounts are already of record. The bill then goes on to direct and require that the overseas teachers *shall* be paid salaries determined by the standard. There is no room for the substitution of independent views or judgments by any Federal, civilian or military official. The average of the range of rates of salaries paid teachers having positions of comparable levels of responsibility in urban school jurisdictions of 100,000 or more population within the United States will have to be computed, and all of the figures are matters of public record, each year, and the results of the computations will be applied directly to overseas teachers' salaries." *Id.* at p. 4 (emphasis in original).

Public Law 89-391 was therefore enacted to amend Section 5(c) of the Act so as to provide that:

"The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school

jurisdictions in the United States of 100,000 or more population." 80 Stat. 117, 5 U.S.C. § 2353(e).

In the 1966 legislation Congress clearly intended only to accomplish the objective of the 1959 Act—which it felt had been undermined by DoD—and to insure that that which it had provided in the 1959 Act would henceforth be carried out without compromise or deviation. All the 1966 legislation did was to write into statutory law the DoD formula for computing salaries pursuant to the "in relation to" substantive standard prescribed in the 1959 Act—but without any adjustment for the per pupil limitation.

### E. Proceedings Below

This case involves 2,974 individual plaintiffs who brought six separate actions in the Court of Claims under 28 U.S.C. § 1491, to recover the difference between the compensation they were entitled to under the Act and the compensation they had in fact received.[19]

The Court of Claims, Judges Nichols and Durfee dissenting, granted summary judgment to the Government. Much of the majority opinion dealt with a contention, urged at one time by plaintiffs, that they were entitled to be paid the same rates as teachers in the District of Columbia. This contention was withdrawn in the Petition for Rehearing and therefore need not be dealt with here.

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[19] Seven petitions on behalf of 2,975 plaintiffs, with identical claims, were filed in the Court of Claims. The actions were consolidated and decided together on cross-motions for summary judgment.

Two of the plaintiffs died after their cases were filed and their legal representatives were substituted in their place and stead. One of the plaintiffs did not join in the petition for rehearing in that Court and is not encompased by this Petition.

As to the major issue in the case—whether the Secretary was entitled to reduce salaries which would otherwise be payable solely on the basis of his own judgment as to what portion of the annual DoD overseas schools appropriations should be used for teachers' salaries—the Court majority assumed that the Act gave discretion to the Secretary and that such discretion was sufficiently broad to permit such action (App. A, p. 13a). The majority held in effect that the "in relation to" substantive standard served no function whatever, inasmuch as the Act constituted no more than an authorization by Congress to DoD to establish salaries at whatever level Congress might authorize in the annual appropriations acts. It also relied upon *Mitchell* v. *McNamara,* 122 U.S. App. D.C. 224, 352 F. 2d 700 (1965) (App. A, p. 14a), without noting that *Mitchell* involved a dismissal for lack of jurisdiction and did not involve any decision on the merits. In its reliance upon the statements of the proponents of the Act that it was not a "pay raise measure" and their estimates that its initial cost would be a modest $270,000 (App. A. p. 15a), the majority overlooked the fact that overseas teachers' salaries at that time stood in relation to salaries for similar positions in the United States;[20] and it was this relationship which Congress directed DoD to maintain.

As additional muster, the majority suggested that the teachers had acquiesced in the Regulations issued by DoD (App. A, p. 17a). To make this point, the majority ignored the Government's stipulation that the teachers "complained to defendant that such rates [which they were being paid] were less than the rates they were entitled to under said Act; such complaints were numerous and were made and continued from approxi-

[20] See footnote 17, *supra.*

mately the end of school Year 1959-1960 until the filing of the Petition herein.[21] Further, the majority availed itself of the doctrine that the contemporaneous interpretation of a statute by the agency charged with its administration is entitled to great weight. (App. A, p. 17a). And, finally, the Court reasoned that since the Congress had been constantly aware of DoD's interpretation and administration of the statute, Congress must have agreed with it (App. A, pp. 17a-18a).

The majority declined to accept the 1966 amendment as an indication of the purpose of the Act, because it post-dated the Act (App. A, p. 19a); but tendered no explanation of how it could accept appropriation acts—which also post-dated the Act—as a guide to the intention of Congress expressed in the substantive standard embodied in the Act (App. A, p. 18a).

The dissenting opinion argued that if DoD had any discretion under the Act, it did not include discretion to adjust salaries in order to meet the exigencies of the per pupil limitation. Having developed a formula for determining teacher salaries "in relation to" those paid in the United States, the dissent argued, DoD was obliged to apply that formula. The statements made by the proponents of the legislation that it would not raise wages, said the dissent, "were apparently true for the immediate future, and for the years that were then more remote, of course no one could have said what would occur." App. A, p. 23a.

The dissent reasoned that the per pupil limitation adopted annually by Congress could not be construed as amending the basic statute or as approving the

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[21] Statement of Facts, par. 14, pp. 7-8.

salary structure promulgated by DoD; that Congress might have believed that the full statutory salary could be paid without increasing the per pupil limitation if other economies were introduced in the operation of the schools; and that Congress never expressly indicated agreement with DoD's interpretation and, indeed, strongly criticized it when it considered and adopted the 1966 legislation.

As for the argument based upon the weight to be given to the contemporaneous administrative interpretation of a statute, the dissent said:

> "* * * such contemporaneous official interpretation is a better guide when it is uncoerced. The predicament an official of the executive branch is placed in, when in a squeeze between law and appropriation limitations, is something we should regard with realism, if with sympathy too. To keep his program going, which he may well regard as his primary duty, he may adopt an interpretation of law which under other circumstances he would consider untenable.
>
> "* * * I would apply with hesitation the whole concept of a contemporaneous administrative interpretation when the interpretation at issue appears to have been necessary for budgetary reasons or might have been supposed to be so necessary." App. A, p. 26a.

## REASONS FOR GRANTING THE WRIT

### I.

This case raises questions of general importance respecting the appropriations powers and practices of the Executive and Legislative Branches of the Federal Government. Involved here is the legal dilemma which confronts an Executive Department when it must meet certain obligations specified by the Congress but

is not given adequate funds to do so. Even though the Executive Department in its own councils recognizes the obligation, it may see no legal alternative but officially to oppose it. As the dissenting opinion below noted: "The exigencies of Government as it is practiced force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in." App. A, p. 27a.

In this case, DoD's refusal to compensate overseas teachers in accordance with the express directive of Congress that they be paid compensation "in relation to the rates of basic compensation for similar positions in the United States" is sought to be justified—and has actually received judicial approval below—on the ground that DoD could adjust its response to the substantive directive of Congress according to subsequent appropriation acts; and on the further ground that those subsequent appropriation acts, which in nowise clearly or expressly gave authority to pay salaries *out* of relation to similar salaries in the United States, somehow could and did bestow such power indirectly. The questions arising from these circumstances are of obviously major importance in the administration of the affairs of the Federal Government and warrant the attention of this Court.

The general practice of Congress is to consider, debate and determine substantive policies upon the reports and recommendations of the Committees having jurisdiction over substantive policy, not in response to the reports and recommendations of the Appropriations Committees. Theoretically at least, the function of the Appropriations Committees is to determine the amount of money required to implement the policies which have been previously established. It cannot be

assumed that Congress is fully aware of the facts or the implications each time an Appropriations Committee minimizes or reduces the funds necessary to carry out substantive programs enacted by the Congress.

The dissent below took note of these considerations: "We are not always obliged to suppose a Congress knows what a committee has been told, especially when, as here, the committee is not the one that reported the statute to be interpreted. When the Commitees on Civil Service of the House and Senate learned of the interpretation here involved, they repudiated it emphatically." (App. A, p. 25a.) On the other hand, the majority opinion in the Court below imparted to appropriation legislation a purpose and effect to vary basic substantive law.

This case thus presents fundamental and delicate issues vital to the Federal process. They are issues of the highest importance, meriting consideration by this Court.

## II.

This case presents the claims of 2,974 petitioners who were or are overseas teachers paid less than the amount mandated by the "in relation to" standard during the 1959-1966 period. Furthermore, there is a class action now pending in the District Court for the Eastern District of Virginia, *Chambers, et al.* v. *United States,* Civil Action No. 4106, involving claims of overseas teachers for compensation in accordance with the Act. Additional actions may be filed involving similar claims. In all, approximately 17,000 teachers, in addition to those involved herein, are in a position to assert such claims. In short, a decision on the merits in this

case will directly affect approximately 20,000 overseas teachers.

This case is the appropriate vehicle for resolving these claims. To await the outcome of other cases, besides entailing inevitable delay, invites substantial injustice. It would be unseemly and patently inequitable if this petition were to be denied, thereby foreclosing the instant petitioners, and the claims of others similarly situated were to be ultimately vindicated.

When a case involves the rights of as many individuals as are involved in this case, and particularly where those rights are asserted against the Government of the United States, the matter deserves the attention of this Court. *Cf. Honda* v. *Clark,* 386 U.S. 484 (1967).

## III.

The decision of the Court below is squarely in conflict with the applicable decisions of this Court. This precise issue was presented in *United States* v. *Langston,* 118 U.S. 389 (1886). That case involved a conflict between a statute which provided that the Ambassador to Haiti would be paid a salary of $7,500.00, and a series of appropriation acts which had appropriated only $5,000.00 for his salary. This Court concluded that he was entitled to the full $7,500.00, holding that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly,

or by clear implication, modified or repealed the previous law." *Id.* at 394. See also *United States* v. *Vulte,* 233 U.S. 509 (1914).

The Court of Claims has previously not sought to dispute this principle. In *Lovett* v. *United States,* 104 Ct. Cl. 557, 582, 66 F. Supp. 142, 146 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946), for example, the Court of Claims stated:

> "In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due."

More recently, in *New York Airways, Inc.* v. *United States,* — Ct. Cl. —, 369 F. 2d 743 (1966), the Court of Claims decided that the statutory power of the Civil Aeronautics Board to fix compensation for air carriers for transporting mail was *not* limited by the amounts appropriated annually by Congress for that purpose. The Court held: "If the purpose of the limiting language in the appropriation under consideration in the instant case was to suspend or amend [the substantive provision], it was not so expressed by statute. Any proof of congressional intention to the contrary in the legislative history must be clear and uncontradicted * * *." *Id.* at 750.

Contrastingly, in this case, there is no express langauge in the appropriation acts modifying the 1959 Act; indeed, there is no reference to teacher salaries in the appropriation acts. Nor is there any "clear and uncontradicted" legislative history supporting the court's interpretation of the appropriation acts.

To the contrary, the only relevant legislative history is that of the 1959 Act (see pp. 3-7, *supra*), which reveals the precisely contrary intention. A single theme dominates: a desire to provide terms and conditions of employment for overseas teachers which are comparable to those applicable to teachers in the United States. The most meticulous reading of the legislative materials—hearings, floor debates, and committee reports—fails to uncover even a hint of an intention to make teacher salaries dependent upon the annual appropriation or the per pupil limitation. Consequently, the result reached by the Court below rests upon a disregard or egregious misreading of the actual legislative history and it imputes to Congress the irrational —and discriminatory and hence, perhaps, unconstitutional—purpose of granting all federal employees, except these overseas teachers, substantial compensation increases during this period.

The decision in this case, therefore, does not alone present a great injustice to and discrimination against many thousands of overseas teachers. It presents a marked departure from long-established principles of law and an unacceptable reading of Congressional intention. If permitted to stand, it will provide a basis for the Government, in future cases, to argue successfully that inadequate appropriations justify a failure to honor its statutory or contractual obligations. This general question of the relationship between obligations and appropriations has arisen many times in the past, and is therefore likely to recur many times in the future, all the more frequently if a decision as significant and questionable as the decision below is permitted to stand without review and resolution of the issues involved by this Court.

## CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 17, 1967)

No. 83-65

JOSEPH B. CRAWFORD, ET AL. v.
THE UNITED STATES

No. 93-65

ROCCO A. TRECOSTA v.
THE UNITED STATES

No. 267-65

GAIL M. AANENSON, ET AL. v.
THE UNITED STATES

No. 449-65

HARRY W. AHO, ET AL. v.
THE UNITED STATES

No. 159-66

HELEN PHYLLIS ABRAHAMSEN, ET AL. v.
THE UNITED STATES

No. 212-66

ESTHER KATRINA BARNES, ET AL. v.
THE UNITED STATES

No. 407-66

EDNA T. ACKAL, ET AL. v.
THE UNITED STATES*

*Rocco A. Trecosta,* pro se, in No. 93-65.

*Earl C. Berger,* attorney of record for plaintiffs in cases numbered 83-65, 267-65, 449-65, 159-66, 212-66, and 407-66. *Lorber, Vogel & Berger,* of counsel.

*James F. Merow,* with whom was *Assistant Attorney General Barefoot Sanders,* for defendant.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

* By order of the court of December 12, 1966, No. 407-66, *Edna T. Ackal, et al.,* v. *The United States,* was consolidated with Nos. 83-65, 93-65, 267-65, 449-65, 159-66, and 212-66.

ON PLAINTIFFS' MOTIONS AND DEFENDANT'S CROSS MOTIONS FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

This is a suit brought by 2,975 plaintiffs for backpay, alleged to be due them as teachers in overseas dependents schools operated by the Department of Defense for the education of minor dependents of overseas personnel of such Department during the years 1959 through 1966, under the provisions of the Overseas Teachers' Pay and Personnel Practices Act, 5 U.S.C. §§ 2351-58 (1964), (hereinafter referred to as the Act or Public Law 86-91).

It is estimated by plaintiffs that this decision will affect some 20,000 overseas teachers whose claims amount to many millions of dollars.

For the purposes of this decision, the above-entitled seven cases have been consolidated inasmuch as the same basic issues are involved in all of them. The plaintiffs Joseph B. Crawford and Nell A. Walthers, No. 83-65, and Rocco A. Trecosta, No. 93-65, have moved for summary judgment and the defendant has filed a cross motion for summary judgment in all of the cases and they will be disposed of on the basis of such motions.

Prior to the years involved in these cases, the Congress did not enact any comprehensive laws with respect to the overseas school program for minor dependents of government personnel. The authority for operating such schools was contained in various appropriation bills for the Department of Defense and its various agencies. The bills authorized funds to be expended for these purposes when the Secretary of the Department concerned found that schools, if any, available in any given locality were unable to provide adequately for the education of such dependents.[1] Also, in each of these appropriation bills, as well as those enacted during the years involved here, Congress

[1] For example, see the Act of July 10, 1952, 66 Stat. 533, § 616 (1952).

placed an express limitation ceiling on the amount of the funds appropriated which could be used for the education of such dependents. This limitation was provided in the form of specific average amounts per pupil (hereinafter referred to as the "per pupil limitation"). For example, the following provision in the Act of October 17, 1963, was typical of similar statements in all of the relevant appropriation acts:

> Sec. 506. Appropriations for the Department of Defense for the current fiscal year shall be available * * * for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries, * * * *in amounts not exceeding an average of $285 per student,* when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents * * *. [77 Stat. 264, § 506 (1963).][2] [Emphasis supplied.]

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[2] The various appropriations acts for 1953 to 1966, inclusive, showing the per pupil limitation for the overseas schools are as follows:

| *Fiscal year* | *Appropriation Act citation* | *Per pupil limitation* |
|---|---|---|
| 1953..... | 66 Stat. 533 § 616 (1952) ..... | $225 |
| 1954..... | 67 Stat. 351 § 614 (1953) ..... | 225 |
| 1955..... | 68 Stat. 351 § 709 (1954) ..... | 235 |
| 1956..... | 69 Stat. 315 § 609 (1955) ..... | 240 |
| 1957..... | 70 Stat. 468 § 607 (1956) ..... | 245 |
| 1958..... | 71 Stat. 323-24 § 607 (1957) ..... | 245 |
| 1959..... | 72 Stat. 724, 867 § 606 (1958) ..... | 245-265 |
| 1960..... | 73 Stat. 378-79 § 606 (1959) ..... | 265 |
| 1961..... | 74 Stat. 350 § 506 (1960) ..... | 275 |
| 1962..... | 75 Stat. 375-76 § 606 (1961) ..... | 275 |
| 1963..... | 76 Stat. 328 § 506 (1962) ..... | 280 |
| 1964..... | 77 Stat. 264 § 506 (1963) ..... | 285 |
| 1965..... | 78 Stat. 475 § 506 (1964) ..... | 285 |
| 1966..... | 79 Stat. 873-74 § 606 (1965) ..... | 455 |

The Congress was informed at all times relevant to this case of the costs charged to appropriated funds and to the per pupil limitation in the overseas schools. Generally, such chargeable costs included salaries of superintendents and other professional and non-professional personnel engaged in the general administration of the schools, including secretarial and clerical assistants, office and miscellaneous school supplies, basic salaries and wages of principals, supervisors, consultants, *teachers,* and librarians. Also included in such costs were instructional material such as textbooks, replacement of library books, and instructional supplies.

There were other costs which were chargeable to appropriated funds but were not chargeable to the per pupil limitation which were generally as follows:

1. *Salaries and wages:*
   a. *Command Staffs and Other Support Personnel.*
   b. *Drivers.*
   c. *Custodial Services.*
2. *Utilities and Services.*
3. *Rental.*
4. *Travel, Overseas Allowances, Government Contributions.*
5. *Equipment (Replacement).*
6. *Supplies.*
7. *Transportation.*[8]

The per pupil limitation was arrived at each year by dividing the average daily membership of each of the schools into the sum of the total obligations and costs men-

[8] Department of Defense Instruction No. 1342.5, pp. 6-8, April 10, 1964.

tioned above which were chargeable to appropriated funds and to the per pupil limitation.

The Department of Defense has operated the overseas schools since World War II and up to and including the years involved in these cases under these appropriation acts of the Congress which expressly limited the expenditure of funds for the education of minor dependents of overseas personnel on a per pupil limitation basis as set forth in the appropriation acts.

The plaintiffs were recruited by the Department of Defense beginning in 1959, to teach in its overseas schools under the system then prevailing as indicated above. Prior to 1960, the plaintiffs were employed as teachers at the grade of GS-7 under the Classification Act of 1949, 5 U.S.C. §§ 1071-1174 (1964). Each of the plaintiffs was employed for a school year and his or her rate of pay was computed on the basis of the annual rate provided by the applicable schedule of the classification act, but only for the school year period for which they were employed. The computation procedure set up for this purpose is listed in Section 944 of the Federal Employees Pay Act of 1945, 5 U.S.C. §§ 901-58 (1964). There was a great deal of dissatisfaction among the teachers under this system because they were only paid for nine or ten-twelfths of the year since they did not work the entire year. This required them to be placed on a nonpay status during recess periods such as Thanksgiving, Christmas, Easter, and during the summer vacations. These problems, among others, caused the Congress to enact Public Law 86-91 which removed all teachers, including the plaintiffs, from the Classification Act of 1949, *supra*, the Federal Employees Pay Act of 1945, *supra*, and the Annual and Sick Leave Act of 1951, 5 U.S.C. §§ 2061-71 (1964), and provided a new system for the appointment of teachers, conditions of employment, rates of basic compensation, length of school years, quarters allowances, and various other entitlements. It

became law on July 17, 1959. The pertinent parts of Public Law 86-91 are as follows:

§ 2352. Regulations of Secretary of Defense

(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—

(1) the establishment of teaching positions;

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

(3) the entitlement of teachers to compensation;

(4) the payment of compensation to teachers;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and appropriate to the purposes of this chapter.

* * * * *

§2353. Administration

(a) Employment and salary practices.

The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, * * *

(b) * * * the secretary of each military department—

* * * * *

(2) shall establish the appropriate annual salary rate in accordance with this chapter for each such position and individual to which * * * determined to be applicable.

(c) Rates of basic compensation

The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

As previously set out, Section 2352 of Public Law 86-91 required the Secretary of Defense to prescribe and issue regulations to carry out the purposes of the Act. In order to issue such regulations, a series of meetings was arranged between the Department of Defense and the Overseas Education Association and the National Education Association which resulted in the promulgation of what was known as "Salary Determination Procedures, Overseas Dependents School Teaching Positions Class I." These procedures provided for an annual review of the compensation schedules with a comparison to be made with rates of compensation in urban school jurisdictions of 100,000 population and over. This was because most of the teachers were recruited from urban areas with a population of 100,000 or more. The procedures thus established were keyed to the per pupil limitation established by Congress. For instance, it was provided that:

3. *Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.*

*Comment:* It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents school. Since salaries comprise a

substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

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5. *When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year.*

*Comment 1:* It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation. [Emphasis in original.] [Salary Determination Procedures, Overseas Dependents School Teaching Positions Class I, Department of Defense, August 31, 1960.]

Pursuant to these salary determination procedures, compensation was adjusted upward for the year 1960, from $150 to $185 per step so as to approximate the average increment to be in effect in school jurisdictions in the United States with a population of at least 100,000.

Each year subsequent to 1960, the Department of Defense requested that the Congress increase the per pupil limitation so that salaries of teachers might likewise be increased. The Congress was thus apprised that the salaries of teachers were directly connected with the per pupil limitation. It appears that the Congress, in fixing

the per pupil limitation for each of the years involved, considered not only the salaries paid to the teachers, but also fringe benefits available to them overseas that were not enjoyed by teachers holding similar positions in the United States.

In 1961, a $10 increase was requested by the Department of Defense of Congress so that a $200 increase in salary might be made for teachers, but the request was denied. For the school year 1962-63, $10 was requested so that salaries might be raised $190, but only $5 was granted and the contemplated raise was not given. For the school year 1963-64, $5 was requested and granted and accordingly the $100 raise was given to teachers as planned. However, for the school year 1964-65, a $10 increase was requested so that teachers salaries might be raised $200, but it was denied and the raise was not possible. For school year 1965-66, the entire per pupil limitation system was changed to include all costs of the overseas schools including $11 to allow an increase of $300 in the salaries of the teachers. The request of $445 per pupil was granted and the $300 raise was given to the teachers. In 1966, Public Law 86-91 was amended so as to provide that salaries for overseas teachers would *be equal* to the salaries of teachers in comparable positions in school districts in the United States having a population of 100,000 or more.[4] This law became

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[4] Public Law 89-391, effective April 14, 1966, provided as follows:

"5 U.S.C. 2352(a)(2) is amended to read as follows:

"(2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more populaton;".

" • • • 5 U.S.C. 2353(c) is amended to read as follows:

"(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."

effective on the first day of the first pay period after the enactment of the Act and accordingly was placed into effect by the Department of Defense promptly after April 14, 1966. Consequently, there has been no problem with respect to overseas teachers' salaries since the passage of the amendment in 1966.

The plaintiffs allege that they were not paid salaries as overseas teachers in accordance with the provisions of this Act. They have filed these suits to be recompensed for the difference between what was actually paid to them and the amount which they claim is owed to them pursuant to Public Law 86-91. It is undisputed that all of the plaintiffs were paid the salaries which they were promised at the time they were recruited.

More particularly, the plaintiffs contend that Public Law 86-91 required the secretary of each military department to fix the salaries of teachers in his department so that they would be *equal* to the salaries paid to teachers in similar positions in schools located in the District of Columbia.[5]

They offer the alternative argument that the Congress fixed their salaries by Public Law 86-91 at rates *equal* to those paid teachers in similar positions in schools located in the United States, but not to exceed the highest salaries for comparable positions in the District of Columbia.

In either event, their position is quite clear—that since the standard set out is one of equality, their salaries must be continuously readjusted to reflect fluctuations in salaries paid to teachers occupying similar positions in the United States.

They claim that the Secretary of Defense had no discretion except to pay the salaries as fixed by the Congress in the Act, and that continuing readjustment was mandatory

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[5] Plaintiff, in No. 93-65, contends that he should have been paid a salary equal to the salaries paid to teachers occupying similar positions in Puerto Rico and Panama.

without regard to the per pupil limitation contained in the appropriation acts of the Congress during the years that are relevant here.

The defendant responds with two contentions either of which, it asserts, bars recovery. First, that the Act in no way requires continuing readjustments in salary rates absent prior congressional approval and in fact there were no funds to pay the salaries now claimed. Second, assuming *arguendo,* that the Congress had established a specific mandatory statutory rate, the fixing of annual expenditure ceilings via the per pupil limitation resulted in an implied repeal of any obligation Public Law 86-91 is said to have created.

Plaintiffs naturally take the position that there was no implied repeal and allege that during each of the years involved in this case there was a balance of unobligated funds remaining on hand for the Department of Defense in a sufficient amount to have paid the plaintiffs the salaries which they claim they were entitled to under Public Law 86-91. Further, assuming for the sake of argument that there was a failure or exhaustion of appropriation, plaintiffs argue that this would not affect their right to secure the additional earnings.

Finally, the plaintiffs in No. 83-65, press a separate claim for the first time in their motion for summary judgment. They urge that they are entitled to additional compensation for their services prior to the effective date of Public Law 86-91 when the Classification Act of 1949, *supra,* was applicable to them. The claim embraces compensation for the various periods during which they were placed on a leave without pay status.

Once unravelled, the present conflict almost wholly involves the proper interpretation to be placed upon Public Law 86-91.

In the first place, the plaintiffs have consfrued the words "in relation to" in Section 2353(c) of the Act to mean "equal to" salaries of teachers occupying comparable positions in schools located *in the District of Columbia.* In order to resolve this matter of interpretation of the Act, we must look to the statute itself.

While we recognize that courts can go beyond the language contained in a statute to ascertain its meaning, they should be careful in departing from the statutory terms. To the extent possible, violence should not ordinarily be done to the words chosen by the Congress. *Flora* v. *United States,* 357 U.S. 63, 65 (1958), *aff'd on rehearing,* 362 U.S. 145 (1960); *Thermo King Corp.* v. *United States,* 173 Ct. Cl. 860, 868, 354 F. 2d 242, 246 (1965).

To accept the plaintiffs' contention that the salaries were to be equal to those in the District of Columbia, would accord little, if any, significance to the prohibition against fixing salaries in excess of those paid to District of Columbia teachers. Moreover, the standard, plainly set out in the statute, of comparing the overseas rates of basic compensation with those prevailing in the United States for comparable positions would be rendered meaningless.

It is a cardinal principle of statutory construction to give effect to every clause, sentence and word of a statute, if possible, rather than to distort the language so as to defeat the plain intent of the Congress. *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955); *United States* v. *Alpers,* 338 U.S. 680, 681-82 (1950); *Johnston* v. *United States,* 163 Ct. Cl. 375, 380 (1963); *Drier* v. *United States,* 108 Ct. Cl. 487, 494, 70 F. Supp. 888, 892 (1947). When this is done with respect to Public Law 86-91, it is clear that it nowhere fixes the salaries of overseas teachers equal to the salaries of teachers occupying comparable positions in the District of Columbia. To place such a construction

upon the Act, we would be required to read into it words which are not there. We therefore reject the plaintiffs' first contention.

Secondly, we must examine whether the Act required rates of basic compensation to be equal to those paid teachers in similar positions in schools located *throughout the United States.*

Aside from the fact that such an interpretation of the Act would prove unworkable under the plaintiffs' theory that the secretary was not clothed with discretion to fix salaries, plaintiffs face and cannot overcome the same obstacles which caused us to discard their first argument—that is—their view reads words into the Act and leaves words and sentences contained therein without purpose.[6]

It is also clear that the Congress merely set the boundaries of the program allowing the Secretary of Defense to fill in the details. Nowhere did Congress fix salaries in Public Law 86-91, nor did it define the positions which were to be looked to in the United States as similar to those occupied by the overseas teachers.

That the Secretary was vested with discretion to issue regulations governing the fixing of rates of basic compensation follows unmistakably from the grant of authority contained in Section 2352(a)(2) of the Act.

Also relevant in this vein is the fact that there was no line item for teachers' salaries or for any other specific expense of the overseas schools in any of the appropriation

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[6] The legislative history referred to by the plaintiffs in their brief does not support their positions. The strongest language contained in the hearings and committee reports do no more than reflect the language contained in the Act itself. See *Hearings on H.R. 1871 and related bills Before the Subcommittee of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. 5-7, 24 (1959); H.R. Rep. No. 357, 86th Cong., 1st Sess. 4-5 (1959).

acts of the Congress. The funds for such schools were appropriated in a lump sum subject to the per pupil limitation and the Department of Defense was authorized to disburse the funds for the various costs and expenses of the schools within the per pupil limitation contained in each appropriation act. Plaintiffs' recognition that no portion of the appropriated funds were earmarked points up all the more the administrative discretion in discerning relative needs and priorities.

While the issue of executive discretion has been determined by the foregoing analysis, it is pertinent to note that some of the plaintiffs in No. 267-65, were denied a writ of mandamus to compel the Secretary of Defense to grant pay raises under Public Law 86-91. *Mitchell* v. *McNamara*, 352 F. 2d 700 (D.C. Cir. 1965). It was said that:

> * * * courts will not interfere with the exercise of executive discretion in situations as confused and difficult as the present. [*Supra* at 701.]

This is persuasive authority for the position we take today. See *United States* v. *Shimer*, 367 U.S. 374, 381-82 (1961); *Fix* v. *United States*, Ct. Cl. No. 323-60, decided November 10, 1966, slip op. pp. 6-7, 368 F. 2d 609, 614.

Having decided that a standard of equality was not prescribed by the Congress and, furthermore, that the Secretary of Defense was clothed with discretionary powers, we turn our attention to the regulations promulgated by him under the Act and an ascertainment of whether plaintiffs' salaries were to be continuously adjusted in accordance with increments given to teachers serving in similar positions in the United States as defined in the regulations, independent of the appropriation authorized.

Although resolution of this issue is not assisted by the most careful reading of the statute, a thorough search of the legislative history of Public Law 86-91 and its

attendant circumstances leads to the conclusion that the plaintiffs' position cannot be sustained.

During the hearings on Public Law 86-91, it was estimated that the proposed legislation would cost only an additional $270,000 per year and that this was due to the fact that an increment was planned for teachers with higher qualifications. This view was concurred in by the teachers' representative, Miss Mary Hoague, who also rejected the thought that the legislation was to be a pay raise measure. *Hearings on H.R. 1871 and related bills Before the Subcommittee of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. 17, 37, 41-2 (1959).

These considerations were accepted by the Congress as illustrated by the following excerpt from H.R. REP. No. 357, 86th Cong., 1st Sess. 3 (1959):

* * * * *

COST

> The Department of Defense estimates that enactment of this legislation will result in increased costs in the approximate amount of $270,000 per annum for operation of the dependents schools in oversea areas. The major part of this additional cost will be incurred by reason of additional compensation allowed certain teachers in recognition of advanced degrees and teaching experience.

* * * * *

Had Congress sought to disclose an intent to create a mandate for continuing automatic pay adjustments divorced from legislative control, it certainly would not have limited its consideration to increments concerned solely with higher qualifications.

In addition, it will be recalled that the Secretary of Defense issued regulations after consultation with repre-

sentatives of the Overseas Education Association and the National Education Association calling for an annual salary review with a comparison to be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Furthermore, as previously indicated, these procedures were explicitly made subject to the per pupil limitation and transmitted to the interested parties.[7]

That the various education associations were advised of the effect of the per pupil limitation contained in the various appropriation acts is amply demonstrated by the following statements they made before the Senate:

> Last August our Overseas Education Association, the National Education Association and the Department of Defense agreed upon the "Department of Defense Salary Determination Procedures," which provides for an annual review and adjustment of overseas teachers' salaries in conformity to the average of stateside districts having 100,000 or more in population. We value this decision highly, and at the same time recognize that the adjustment of our salaries is dependent upon the per pupil money allotment voted by the Congress. [*Hearings on H.R. 7851 Before the Subcommittee of the Senate Committee on Appropriations,* 87th Con., 1st Sess. 1054 (1962).]

Also, it was stated in even a later year:

> This unhealthy salary situation, recognized by DOD's own report, is the direct result of a per-pupil limitation. The limitation limits salaries. It limits the amount of money which may be spent for textbooks,

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[7] Other regulations promulgated by the Secretary of Defense also made reference to the per pupil limitation. See Department of Defense Instruction No. 1342.5, October 28, 1957; Department of Defense Instruction No. 1342.5, April 10, 1964. (The latter instruction cancelled the instruction dated October 28, 1957.)

library books, and tuitions, but since most of the money appropriated goes into salaries, it is salaries which are in turn most limited. [*Hearings on H.R. 7179 Before the Subcommittee of the Senate Committee on Appropriations*, 88th Cong., 1st Sess. 1456 (1964).]

At this juncture we have the situation where there was not even the slightest suggestion or intimation by the Congress that Public Law 86-91 required constant adjustment of teachers' salaries, where the Secretary of Defense implemented the statute under specific monetary ceilings, and where the persons affected were mindful of this interpretation and, at least, to some extent acquiesced in it.

These circumstances call for application of the rule that administrative practice consistent and generally unchallenged "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norweigian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Accord, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), *rehearing denied*, 380 U.S. 989 (1965), *Power Reactor Development Co.* v. *International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961). See *Iran Nat'l Airlines Corp.* v. *United States*, 175 Ct. Cl. 504, —, 360 F. 2d 640, 643 (1966); *H. B. Zachry Co.* v. *United States*, 170 Ct. Cl. 115, 125, 344 F. 2d 352, 358-59 (1965); *Schellfeffer* v. *United States*, 170 Ct. Cl. 178, 187, 343 F. 2d 936, 942 (1965). We accept this administrative interpretation as correct.

Fortifying this result even further is the fact that at hearings on appropriations for the overseas school program for the years in question, the Congress was continually made aware of the interpretation placed upon the

Act by the Secretary of Defense.[8] This supports "the natural presumption that Congress, in its subsequent actions, accepted them as legitimate interpretations." *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-45 (1954); *Power Reactor Development Co., supra*, at 408-09. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 319 (1958).

This legislative history of Public Law 86-91 supports and adds emphasis to the conclusions we have already reached that the Act did not fix the salaries of overseas teachers equal to those in comparable positions in the District of Columbia or throughout the United States.

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[8] The plaintiff seeks to make much of the fact that the Department of Defense never sought supplemental appropriations to meet the salary demands of the plaintiffs. It is a fact, however, that the Department of Defense requested an increase in the per pupil limitation for every fiscal year bearing upon the subject matter in these suits so that teachers' salaries could be raised. See *Hearings on H.R. 11998 Before the Subcommittee of the Senate Committee on Appropriations*, 86th Cong., 2d Sess., pt. 2, 1415 (1961); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 87th Cong., 1st Sess., pt. 6, 138-39 (1962); *Hearings on H.R. 7851 Before the Subcommittee of the Senate Committee on Appropriations*, 87th Cong., 1st Sess. 1143 (1962); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 87th Cong., 2d Sess., pt. 3, pp. 718-22, pt. 6, p. 77 (1963); *Hearings on H.R. 11289 Before the Subcommittee of the Senate Committee on Appropriations*, 87th Cong., 2d Sess. 719-20 (1963); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 88th Cong., 1st Sess., pt. 4, 49, 982, 998-99 (1964); *Hearings on H.R. 7179 Before the Subcommittee of the Senate Committee on Appropriations*, 88th Cong., 1st Sess. 213 (1964); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 88th Cong., 2d Sess., pt. 2, 633-50 (1965); *Hearings on H.R. 10939 Before the Subcommittee of the Senate Committee on Appropriations*, 88th Cong., 2d Sess., pt. 2, 532-34, 764-66 (1965); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 89th Cong., 1st Sess., pt. 5, 580-602, 681-722 (1966); *Hearings on H.R. 9221 Before the Subcommittee of the Senate Committee on Appropriations*, 89th Cong., 1st Sess., pt. 2, 554-55 (1966).

Furthermore, it shows unmistakably that such salaries were keyed to the per pupil limitation contained in the appropriation acts of the Congress and were to be fixed within such limitation in the discretion of the Secretary of Defense.

The plaintiffs fashion the argument, however, that since the 1966 amendment to Public Law 86-91 provides that salaries for overseas teachers would be equal to the salaries of teachers in comparable positions in school districts in the United States having a population of 100,000 or more, this is a positive expression of the intent that Congress had in enacting the original legislation in 1959.

While undoubtedly both the plaintiffs and defendant could select choice bits of legislative history to support their views as to the effect of the 1966 amendment, we are of the opinion that it is hazardous business to resort to that legislative history in ascertaining the intent underlying the passage of Public Law 86-91. *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 348-49 (1963) and cases collected therein.

Moreover, it is arguable that Congress, as shown by its continued acquiescence, accepted the interpretation of the Department of Defense and recognized the need for the 1966 amendment if a different result was desired.

Plaintiffs, however, place great emphasis on the assertion that the Department of Defense had unobligated funds from which these salary claims could have been paid.

Since we have recognized that increments to teachers' salaries were limited by the congressional appropriations as set forth each year in the per pupil limitation, suffice it to say that the Department of Defense would have no authority to expend funds except for the purposes for which an appropriation was made. See *Norcross* v. *United States,* 142 Ct. Cl. 763 (1958); *Norcross* v. *United States,*

142 Ct. Cl. 767 (1958); *Lovett* v. *United States,* 104 Ct. Cl. 557, 66 F. Supp. 142 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946); *Maiatico* v. *United States,* 302 F. 2d 880 (D.C. Cir. 1962); 21 Ops. Att'y Gen. 414, 415 (1896); 34 Ops. Comp. Gen. 599, 600 (1955).

Since it is uncontroverted that there were no funds remaining within the confines of the per pupil limitation with which the salaries claimed could have been satisfied and that no abuse of discretion has been shown in the disbursement of those funds by the agency, we conclude that the plaintiffs have shown no basis for recovery under Public Law 86-91. See *United States* v. *Shimer, supra.*

In view of our disposition of the case thus far, it is unnecessary to consider the other issues raised by the parties concerning Public Law 86-91.

The determination of one further issue, however, is necessary to a complete disposition of this case. That is the claim based upon the Classification Act of 1949, *supra.*

Inasmuch as this claim was not pleaded in the petition in No. 83-65, filed on March 18, 1965, nor was an amendment sought as provided in our Rule 22, it is not properly before the court at this time and cannot be considered.

Accordingly, defendant's cross motion for summary judgment is granted, plaintiffs' motions for summary judgment are denied, and plaintiffs' petitions are dismissed.

Nichols, *Judge,* dissenting:

With all respect, I am unable to agree with the decision of the majority in this case.

I start with the language of the controlling statute, 5 U.S.C. 2353(c), which at pertinent times (July 1959

to the institution of this action in March 1965) read as follows:

> *Rates of Basic Compensation.*
>
> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

Before going into the complications arising from events subsequent to enactment, it is well to consider what this means, taken on its face alone. Plaintiff says "in relation to" means "equal to" which of course would make interpretation easy. Webster's Unabridged Dictionary (1953 ed.) says that in the phrase "in relation to" the word "relation" means "reference" or "respect." I think a fair interpretation is that the Secretary is to "refer" to stateside salaries in the sense that a mariner might "refer" to a chart. The chart does not tell the mariner where to go but it tells him how to find his destination and the location of shoals he is to avoid. He would be guilty of misconduct if he ignored what the chart told him. I think the Secretary was to ascertain stateside salaries and, in light of his findings, was to fix compensation that was at least comparable. Otherwise why refer to them? He was clearly not to ignore stateside salaries and fix basic compensation out of all "relation" to them, which I find to be what he did, as is admitted in defendant's statement, paragraph 16(a). This appears to be a typical case of a proper delegation of legislative authority, with guidelines. *J. W. Hampton & Co.* v.

*United States*, 276 U.S. 394 (1928) (authority to raise customs duties to "equalize" cost of production). Delegation of uncontrolled discretion, or discretion without guidelines would be of doubtful constitutionality and we are not to presume the Congress intended it. *Cochnower v. United States*, 248 U.S. 405 (1919).

The defendant knows what "in relation to" means, whether or not the court does. It says (original brief, p. 28):

> Thus, from the date that the salary provisions of Public Law 86-91 were implemented, in January of 1960, throughout the school year ending in June of 1961, teachers were compensated pursuant to a pay schedule fixed by the Department of Defense *in relation to* school districts in the United States having a population of 100,000 or more. • • • (Emphasis supplied.)

It makes no such claim for any later year in this litigation. Evidently, to it, the statutory language set a clear and specific guideline which it conformed to up to June 1961, and not afterwards. At page 31 of the original brief it says:

> Thus, for the school year 1961-1962 the rates paid were admittedly lower than those which would have been paid had the rates been adjusted to conform to the average of districts • • •.

And so it went.

Assume then, the Secretary had not the apparently impossible task of determining an exactly "equal" compensation, but of finding one that was "in relation," he could have exercised his authority validly to select any figure within a range. If budgetary considerations had led him to prefer the lower side of the range, his choice would not have been subject to challenge in court. But here he made

a two step determination. In every year after 1961, he selected a figure that he found was "in relation," and then afterwards he cut it substantially to meet his budget exigencies. This procedure seems to me in a manner to say to the teachers involved, to the Congress, and to this court, that the final figures were not "in relation" and were out of "relation" to the statutory guidelines, by amounts furnished to the Congressional Committees.

It is conceded, as it must be, that he could not cut a statutory salary to avoid incurring a budget deficiency, or at least, if he did, the difference would be recoverable in this court. *United States* v. *Langston,* 118 U.S. 389 (1886). See the long line of cases cited, *Lovett* v. *United States,* 104 Ct. Cl. 557, 582, 66 F. Supp. 142 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946).

Defendant repeatedly states the proponents of the bill denied it would raise wages. This was apparently true under any interpretation for the immediate future, and for the years that were then more remote, of course no one could have said what would occur. Defendant also says the law did not create a "mandate for continuing automatic pay adjustments." It apparently does not mean, as one might at first think, that the statute froze wages at their then rates. The Secretary did in fact adjust them annually. What the court might do if he had made no determinations but had elected to leave existing scales in effect is not before us and we need not consider what, in that event, plaintiffs' remedies would have been.

If, for fear of a budget deficiency, the salary is set below the range the guidelines permit, the situation is the same as if a fixed salary were cut. If the Secretary had not made his determination, within the guidelines, and then cut it, there might be some question as to the measure of damages, but here he has solved that problem for us, at least sufficiently for the purposes of a dissenting opinion.

Now, I turn to the subsequent events that are supposed to make a difference. It appears that when 5 U.S.C. 2353 (c) became law, as for some time before, the Congress had been accustomed to prescribe in the annual Department of Defense appropriation a per pupil limitation (hereinafter, as in the briefs, PPL) which limited the availability of funds for overseas dependent's schools, including teacher's salaries and certain overhead items in Government schools, and charges in tuition-fee schools not operated by the Department of Defense, to a stated amount per pupil. Soon upon the enactment of 5 U.S.C. 2353(c) the Department took the position that if the PPL came into any conflict with the new standard, it would prevail, that is, statutory salaries would have to be cut to meet the PPL. In presenting its annual appropriation requests, the Department made it clear to the Appropriations Committees that the PPL would have to be lifted if the statutory standard were to be met, and by implication, that it was being treated as controlling *pro tanto* the statutory provision. Nevertheless, the PPL was not raised, or not enough. The Department came to fix the salaries tentatively only, and then to cut them when the appropriation bill was law and the PPL therefore known.

Are the PPL provisions to be treated as amending annually the provisions of 5 U.S.C. 2353(c)? The answer seems clearly no. Normally, limitations in appropriations do not "reach to this court." *Lovett* v. *United States, supra.* On their faces, moreover, they could stand together and both be given effect. The teachers apparently could have been allowed their statutory pay and the PPL also observed, by increasing the size of classes, cutting overhead, or otherwise. The only time the Appropriations Committees mentioned the apparent conflict, it said in substance that the PPL could be observed and teachers be given their justified increases if certain economies were effected. House Report 1607, 87th Cong., 2d Sess. It may well be that as a practical matter, the full salaries could not be paid within the PPL's, but this depended on

information the Congress may not have accepted as true. A statute is not readily to be taken as repealing by implication another which it does not designate expressly for repeal. *United States* v. *Langston, supra.* Defendant also refers to the Anti-Deficiency Act, 31 U.S.C. 665, but this would not be binding on this court, whose judgments are separately funded.

If the Congress adverted to the possibility that the PPL's were construed as denying the teachers their legal rights, it may have intended that they be tested in this court.

Nor are these subsequent proceedings to be treated as subsequent legislative history bearing on the interpretation of 5 U.S.C. 2353(c). We would have to find the statute ambiguous, which in my view it hardly is. A declaration by the Congress itself what a former Congress meant would not be more than persuasive, depending on circumstances. *Rainwater* v. *United States,* 356 U.S. 590, 593 (1958). That declaration not only did the Congress not give, but the Appropriations Committees did not. It was very careful to leave the statutory construction here involved to stand on the authority of the Department of Defense alone. Indeed, to have complained that the Department of Defense was being too careful with appropriated funds would, for an appropriations committee, have been a case of man biting dog. The Congress must know of a statutory construction before it can ratify it. We are not always obliged to suppose a Congress knows what a committee has been told, especially when, as here, the committee is not the one that reported the statute to be interpreted. When the Committees on Civil Service of the House and Senate learned of the interpretation here involved, they repudiated it emphatically. In Rep. No. 951, 89th Cong., 2d Sess., the Senate Committee said the law had "never been administered in the manner which Congress intended."

The strongest argument for the defendant derives, in my view, from the interpretation which the Department of Defense adopted upon enactment of the statute to be construed. Undoubtedly, in view of their sponsorship of the legislation and the work with the committees they must have done, there could have been unrecorded or unpublished legislative history leading their officials to construe the legislation as they did. To me, however, such contemporaneous official interpretation is a better guide when it is uncoerced. The predicament an official of the executive branch is placed in, when in a squeeze between law and appropriation limitations, is something we should regard with realism, if with sympathy too. To keep his program going, which he may well regard as his primary duty, he may adopt an interpretation of law which under other circumstances he would consider untenable. Of course, the issue was academic as long as the PPL did not force the teachers' pay out of "relation." When it did, the Department might well have feared that to insist on the statutory pay levels would throw the overseas dependent's schools into chaos. To insist on the teachers' statutory rights might have denied another right, and denied it beyond all reparation by the courts; the right of those who serve their country overseas to have their children educated as they would be at home. The facts, of course, do not establish that the interpretation here involved was made under duress, but there seems to me a substantial possibility that it was. Actual inquiry as to this would be difficult and perhaps unwholesome, but I would apply with hesitation the whole concept of a contemporaneous administrative interpretation when the interpretation at issue appears to have been necessary for budgetary reasons or might have been supposed to be so necessary.

In *Schellfeffer* v. *United States*, 170 Ct. Cl. 178, 343 F. 2d 936 (1965), this court took the view that it would hesitate to overturn a consistent administrative interpre-

tation of a statute, particularly when to do so would impose on the United States a large financial burden. Sound in its then context, such a course is misapplied when the administrative interpretation involved is shown to have been itself based on budgetary considerations. It would then be tantamount to saying a debtor is exonerated from paying by his consistent and long-established opposition to paying. If the Government should benefit from such a doctrine, it would hardly have put itself in the position of a private litigant, who would probably be jailed for contempt if he interposed such a defense. The Government here was on notice that its interpretation of the statute was challenged, as it does not deny, and it continued to adhere to its position, without doing anything to clear the matter up. To my way of thinking, a long-continued administrative practice is on a different footing when it has ignored an equally long-continued challenge to its legality, and in that event it awaits the event of judicial determination without influencing it in any way.

Defendant's whole handling of this case has an odd flavor I find it hard to give a name to. They are stuck with their position. They must do their best to defend it, as they do. Yet, if plaintiffs should prevail, I cannot picture the Pentagon being draped in black. The exigencies of Government as it is practiced force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in. If an institution less august than the Department of Defense were involved, I would call its role in this litigation ignominious.

This dissent does not apply to any claim by plaintiffs for salary earned before June 30, 1961, or for any salary earned thereafter in excess of the difference between the amounts paid and the amounts determined by the Department of Defense "in relation to" certain stateside salaries, as acknowledged in its briefs and other filings.

DURFEE, *Judge*, joins in the foregoing dissenting opinion.

## APPENDIX B

### Statutes and Regulations Involved

The Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959), provided in pertinent part as follows:

"Sec. 4. (a) Not later than the ninetieth day following the date of enactment of this Act, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this Act. Such regulations shall govern

• • •

"(2) the fixing of rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

• • •

"Sec. 5. (a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this Act, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act.

• • • •

"(c) The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

• • •

The Department of Defense Appropriation Acts for the fiscal years 1953 through 1966 each contained a section authorizing the expenditure of funds for the operation of schools for the education of dependents of military and civilian Government personnel stationed overseas. The applicable Appropriations Act for the fiscal year 1953, § 616, 66 Stat. 533, provides in pertinent part as follows:

> "Appropriations for the Air Force and the Army for the current fiscal year shall be available for expenses in connection with * * * primary and secondary schooling for dependents of military and civilian personnel of the Department of Defense residing on military installations or stationed in foreign countries in amounts not exceeding an average of $225 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents."

The equivalent provisions in the subsequent Appropriation Acts are substantially identical, except for the amount of the average expenditure per student, which varied as follows:

| *Fiscal year* | *Appropriation Act citation* | *Per pupil limitation* |
|---|---|---|
| 1953..... | 66 Stat. 533, § 616 (1952) ..... | $225 |
| 1954..... | 67 Stat. 351, § 614 (1953) ..... | 225 |
| 1955..... | 68 Stat. 351, § 709 (1954) ..... | 235 |
| 1956..... | 69 Stat. 315, § 609 (1955) ..... | 240 |
| 1957..... | 70 Stat. 468, § 607 (1956) ..... | 245 |
| 1958..... | 71 Stat. 323-324, § 607 (1957) .. | 245 |
| 1959..... | 72 Stat. 724, 867, § 606 (1958) .. | 245-265 |
| 1960..... | 73 Stat. 378-379, § 606 (1959) .. | 265 |
| 1961..... | 74 Stat. 350, § 506 (1960) ..... | 275 |
| 1962..... | 75 Stat. 375-376, § 606 (1961) .. | 275 |
| 1963..... | 76 Stat. 328, § 506 (1962) ..... | 280 |
| 1964..... | 77 Stat. 264, § 506 (1963) ..... | 285 |
| 1965..... | 78 Stat. 475, § 506 (1964) ..... | 285 |
| 1966..... | 79 Stat. 873-874, § 606 (1965) .. | 455 |

The Department of Defense Directive No. 1400.13, issued on October 15, 1959, provided in pertinent part as follows:

"F. *Compensation of Teaching Positions*

"1. *Basis*

"Rates of basic compensation for teaching positions will be fixed by the Secretaries of the military departments in relation to rates of basic compensation for similar positions in the continental United States, exclusive of Alaska and Hawaii, but no such rate shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the Municipal government of the District of Columbia.

"2. *Schedules*

"A single, coordinated, uniform compensation schedule will be jointly developed and adopted, and from time to time adjusted, as appropriate, by the three military departments, which will:

"(a) List the various classes and levels of teaching positions;

"(b) For each level, establish and prescribe on a school year basis the basic compensation step rates. At each level the schedule will also provide, in each step rate, for an appropriate additional increment for those teachers who possess a Master's degree and may provide a further increment for those who have completed a higher level of academic preparation."

There were various amendments to this Directive subsequent to October 15, 1959 but the pertinent provisions quoted above remained unchanged.

On August 31, 1960, the Department of Defense promulgated "SALARY DETERMINATION PROCEDURES—OVERSEAS

DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1" which provides as follows:

"SALARY DETERMINATION PROCEDURES

"OVERSEAS DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1*

"1. *The compensation schedule will be reviewed annually.*

"COMMENT: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper.

"2. *Review of the compensation schedule will be based on surveys of teaching position salaries conducted by the military departments, including the use of such athoritative salary data as may be available.*

"COMMENT: The military departments will conduct surveys of teacher salaries, extra curricular pay benefits and certain school administrative type positions as are necessary but will make maximum use of available authoritative data. The National Education Association collects and publishes data on salaries paid classroom teachers and school administrators in the United States. These publications are factual and

(* These procedures relate to teaching positions as defined in DOD Instruction 1400.13).

can be used along with other appropriate data in determining overseas dependents school teachers' salaries.

"3. *Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustments in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.*

"COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

"NOTE: By Bureau of the Budget regulations the Department of Defense is not permitted to budget for anticipated increases in wages or salaries based on prevailing rates outside of the Federal Government. Only wage or salary schedules based on wages and salaries actually being paid can be considered.

"4. *The compensation schedule will be established and adjusted "in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."*

"COMMENT 1: The above term will be applied as follows:

"(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

"(b) The beginning salary step (step (a)) of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

"(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars.

"COMMENT 2: If teacher salaries continue to rise, as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one or a few school districts grant increases. If it is not administratively feasible to reflect very small increases, a reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments.

"COMMENT 3: A point may be reached where consideration will have to be given to a limitation on adjustments where such adjustments would result in these employees paid from the compensation schedule

receiving a higher salary than their Classification Act supervisors.

"5. *When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year.*

"COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

"COMMENT 2: From a management standpoint, the start of the school year seems to be the most appropriate time to place adjustments in effect. In passing, however, it should be noted that when adjustments are effected, new teachers will go on duty at a salary higher than had been indicated at the time they were recruited. It is understood that this is no problem, for at the time of recruitment, prospects can be told that the starting salary will not be less than last year's figure and (if adjustments have been proposed) it may be more. Recruiters, of course, can offer a certain figure during these years when adjustments are not being proposed."

## APPENDIX C

The following Table appears in H. Rep. No. 519, 89th Cong., 1st Sess. (1965), p. 11:

TABLE I.—*Trends in salary schedule averages, U.S. urban school districts, 100,000 and over in population, and overseas dependents schools, recent years*

| Year | Number of districts (B.A. and M.A. classes) | B.A. salary class, mean amounts scheduled | | | Difference between M.A. (col. 7) and B.A. (col. 3) | M.A. salary class, mean amounts scheduled | | | 6 years; master's plus 30 hours, mean amounts scheduled[1] | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Beginning salary | Annual increments, number and size[2] | Maximum salary | | Beginning salary | Annual increments, number and size[2] | Maximum salary | Beginning salary | Annual increments, number and size[2] | Maximum salary |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) | (11) | (12) |
| 1959-60 ..... | 168 | $4,070 | 12 at $187 | $6,269 | $317 | $4,387 | 13 at $190[3] | $6,797 | $4,887 | 13 at $213[3] | $7,661 |
| 1960-61 ..... | 160 | 4,294 | 12 at $192 | 6,591 | 295 | 4,589 | 13 at $196[3] | 7,135 | 5,064 | 13 at $225[3] | 7,986 |
| 1961-62 ..... | 167 | 4,454 | 12 at $199 | 6,790 | 313 | 4,767 | 13 at $202 | 7,387 | 5,243 | 13 at $229 | 8,221 |
| 1962-63 ..... | 177 | 4,549 | 12 at $196 | 6,905 | 354 | 4,903 | 13 at $205 | 7,568 | 5,453 | 13 at $233 | 8,480 |
| 1963-64 ..... | 178 | 4,693 | 12 at $201 | 7,101 | 371 | 5,064 | 13 at $213 | 7,829 | 5,661 | 13 at $238 | 8,756 |
| 1964-65 ..... | 180 | 4,850 | 12 at $210 | 7,366 | 375 | 5,225 | 13 at $225 | 8,146 | 5,822 | 13 at $255 | 9,136 |
| Department of Defense schedule: | | | | | | | | | | | |
| 1960-61, 1961-62, and 1962-63 | — | 4,065 | 10 at $185 | 5,915 | 200 | 4,265 | 10 at $185 | 6,115 | 4,365 | 10 at $185 | 6,215 |
| 1963-64 and 1964-65 .... | — | 4,165 | 10 at $185 | 6,015 | 200 | 4,365 | 10 at $185 | 6,215 | 4,465 | 10 at $185 | 6,315 |

[1] Fewer schedules recognize the 6th year than recognize the B.A. and M.A.; in 1964-65 there were 119 such districts, or 66 percent of the schedules analyzed. In these 119 schedules, the figures shown in cols. 3-9 were as follows: Col. 3, $5,096; col. 4, 12 at $214; col. 5, $7,660; col. 6, $351; col. 7, $5,447; col. 8, 13 at $239; and col. 9, $8,554.

[2] Because of rounding in computations, the final increment may be slightly different from the amount shown, in order to arrive at the mean maximum.

[3] Partly estimated.

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 792

JOSEPH B. CRAWFORD, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners are teachers presently or formerly employed in the school system maintained by the Defense Department for the education of the minor dependents of military personnel abroad. In this suit for back pay for the years 1959 through 1966, petitioners contend that the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213, 5 U.S.C. 2351 *et seq.* (1964 ed.),[1] imposed an in-

[1] This Act was, as discussed *infra*, substantially amended in 1966, and in its present form is codified as 20 U.S.C. 901 *et seq.* (Supp. II, 1965-66).

flexible duty on the Secretary of Defense to adjust the compensation of overseas teachers to the level of salaries paid for similar work in this country. At the relevant times the governing language of the Act authorized the Secretary of each military department, subject to regulations promulgated by the Secretary of Defense, to fix compensation for overseas teaching positions "in relation to the rates of basic compensation for similar positions in the United States," (5 U.S.C. 2353(c) (1964 ed.)). The Secretary of Defense interpreted this language as subjecting any computation of salary scale to the limitations provided by the ceiling on the funds which might be expended on education of dependents. This so-called "per pupil limitation", which was routinely inserted in Defense appropriation bills both before and after the 1959 Act, fixed the maximum average amount that could be expended for educational services in connection with each dependent.

The first year of operation under the Act (1960) presented no problem since the teachers' salaries fixed by the Secretary were generally commensurate with those paid in the United States. Thereafter, while teaching salaries in this country increased, the Department of Defense each year requested increases in the "per pupil limitation" to allow for raises for overseas teachers. Congress, however, with full knowledge of the Secretary's interpretation of the Act, declined to appropriate funds sufficient to permit the overseas teachers' salaries to keep pace.

In 1966 the Act was amended. The language authorizing the Secretary to prescribe regulations fixing

the compensation for overseas teachers "in relation to" salaries in this country was deleted. In its place Congress substituted a direction that the Secretary prescribe regulations providing for:

> (2) the fixing of basic compensation for teachers and teaching positions at rates *equal to* the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. [20 U.S.C. 902(a)(2) (Supp. II, 1965-66) (Emphasis added).]

This amendment, however, was expressly given only prospective application by Congress (80 Stat. 118).

Relying on the 1959 Act, petitioners seek recovery of the difference between the salaries paid them and what they would have received if their salaries had been "equal to" the earnings of teachers in comparable systems in the United States. On cross-motions for summary judgment, the Court of Claims ruled in favor of the government. *Crawford, et al.* v. *United States*, 376 F. 2d 266 (Pet. App. 1a-27a). The court held that neither the language nor the legislative history of the Act supported petitioners' contentions regarding mandatory wage increases. In support of its decision, the court explained that contemporaneous construction of the Act by the Secretary, by Congress, and by petitioners' own representatives, all reflected awareness that the Act contemplated that the Secretary would have discretion in setting the rates for teachers' salaries and that future pay raises were sub-

ject to limitations in the relevant congressional appropriations.

The court also noted that this was the second suit by the overseas teachers seeking a federal court judgment raising their compensation on the basis of the Overseas Teachers Pay Act. (Pet. App. 14a). The Overseas Education Association (which represents petitioners) had previously brought a class action for mandamus against the Secretary of Defense, presenting the identical contentions made by petitioners here, *viz.*, that the Act required the Secretary to raise and to maintain overseas teachers salaries at levels equal to those prevailing in the United States. The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of that action on the ground, *inter alia*, that fixing appropriate levels of teachers' pay was a matter the Act committed to executive discretion with which the court would not interfere. *Mitchell* v. *McNamara*, 352 F. 2d 700 (C.A.D.C.).

## DISCUSSION

The decision of the Court of Claims is correct, in accord with the only other decision interpreting the provision in question, and of no prospective importance. Further review by this Court is therefore not warranted.

1. Petitioners rely on 5 U.S.C. 2353(c) (1964 ed.), which provided in pertinent part that:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military depart-

> ment *in relation to* the rates of basic compensation for similar positions in the United States * * *. [Emphasis added.]

Essentially, petitioners contend that by this 1959 Act Congress intended to require the Secretary not only to set overseas teachers' salaries initially, but also placed on him the duty of reviewing those salaries periodically and granting wage increases automatically in order to maintain their compensation at a level "equal to" that paid in the United States, all without reference to budgetary restrictions. As the opinion of the Court of Claims makes clear, however, neither the language nor the legislative history of the statute supports that contention.

To begin with the statute was cast in discretionary, not mandatory terms. As the court noted (Pet. App. 13a), the provisions neither set specific salaries nor defined the positions which were to be looked to in the United States as "similar" to those of the overseas teachers. The Act spoke of setting pay scales "in relation to" domestic levels, and in ordinary usage this standard includes more flexibility than the "equal to" requirement petitioners would read into the statute. Nowhere was there any reference to mandatory periodic review and adjustment of those salaries once fixed initially.

The history of the legislation explains the absence of such provisions. As the court below explained (Pet. App. 5a-6a), this legislation was enacted because the conditions peculiar to school teaching (long summer vacations and holiday recess periods) could not easily be accommodated within the framework of

the pay and leave statutes covering regular government employment. It was to eliminate the hardships caused by applying those statutes to teaching positions that Congress legislated in 1959.[2] The statutes generally regulating the pay of federal civil servants contain no provision for mandatory increase in federal salaries to reflect a rise in comparable non-federal salaries. But nowhere in the committee reports or in the floor debates on the measure in suit was there the slightest suggestion that this legislation—enacted as a substitute for the regular legislation governing the conditions of federal employment—would entail such an automatic pay raise feature and confer preferred status on overseas teachers. On the contrary, as the court's opinion correctly notes (Pet. App. 14a-16a), the statute was enacted after Congress heard representatives of the overseas teachers themselves state that this legislation was not intended as a pay-raise measure.

The Court of Claims also accurately observed (Pet. App. 7a) that the Secretary's interpretation of the Act, made at the time of its passage and continuously maintained before Congress and with the teachers, was that his authority to raise the pay of overseas teachers was contingent upon adequate Congressional appropriations, *i.e.*, increases in the "per pupil limitations" on overseas school expenditures in the annual Defense Department appropriation bills. As the court's opinion notes (Pet. App. 2a-5a), there is no

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[2] See H. Rep. No. 357, 86th Cong., 1st Sess.; S. Rep. No. 141, 86th Cong., 1st Sess.

permanent legislation respecting the overseas school program for military dependents. Authority to operate such schools is found only in the annual Defense Department appropriation acts (see Pet. App. 3a). These appropriations consistently limited the funds expendable for such purposes to an average specified amount "per student", and such expenditures historically determined the amounts available for the salaries of overseas teachers. In this context, the Secretary's interpretation of the Act as authorizing him to raise teachers' salaries only if Congress raised the "per pupil" allotment sufficiently to permit him to do so, was an entirely reasonable conclusion. In some years Congress accepted the Secretary's request that the "per pupil limitation" be raised so that teachers' salaries could be increased, and in other years Congress refused (Pet. App. 9a). The Court of Claims did not err in accepting the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion". *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315. Accord, *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. This deference is particularly appropriate in this case; not only was the administrative interpretation repeatedly brought to the attention of Congress,[3] but petitioners' own representatives also advised the legislature of their similar understanding and the Congress in each appropriation bill acted on

[3] See the lengthy catalogue establishing this fact in note 8 to the opinion below, Pet. App. 18a.

the basis of that understanding. See Pet. App. 16a-17a. *Power Reactor Co.* v. *Electricians, supra,* 367 U.S. at 408-410; *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 318-319.[4]

2. The ruling below does not conflict with any other decision. On the contrary, it is in accord with the refusal by the District of Columbia Circuit to grant relief on the basis of the same contentions that are urged here. See *Mitchell* v. *McNamara,* 352 F. 2d 700 (C.A.D.C.).

Petitioners' reliance on the decisions of this Court in *United States* v. *Langston,* 118 U.S. 389 (1886), and *United States* v. *Vulte,* 233 U.S. 509 (1914), is wide of the mark. Those cases hold only that statutes fixing the salaries of public officers at a "designated sum" are not considered to be abrogated by subsequent acts which appropriate lesser amounts for that officer for given years, absent specific language to that effect.[5] Here, as the court below noted (Pet. App. 13a), the Act did not establish specific levels for the salaries of overseas teachers, and under the Sec-

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[4] Congressional acquiesence in the Secretary's interpretation of the Act in suit is pointed up by the Senate's refusal to permit the Defense Department to pay for certain items traditionally included in the per pupil allotment out of other funds in order to increase the money available for teachers' salaries. See S. Rep. No. 1238, 88th Cong., 2d Sess., pp. 17-18 (July 24, 1964).

[5] Of course, as the Court has recognized, Congress may certainly repeal substantive legislation in later appropriations measures. *E.g., United States* v. *Dickerson,* 310 U.S. 554; *Belknap* v. *United States,* 150 U.S. 588; *United States* v. *Mitchell,* 109 U.S. 146.

retary's regulations (see Pet. App. 32a-34a) the salaries would not be set administratively until Congress determined the "per pupil limitation." By its regular refusal to approve Defense Department budgets sufficient to provide for the pay increases petitioners believed to be mandatory, Congress was not repealing earlier substantive legislation. It was simply legislating in accordance with its own and the Secretary's understanding that the Act made such raises contingent on Congressional approval of expenditures for that purpose. Cf. *Panama Canal Co.* v. *Grace Line*, *supra*.

3. Finally, the question of statutory construction posed by petitioners is not a matter of prospective importance. As we noted above (pp. 2-3), on April 14, 1966, the Overseas Teachers Pay Act was amended to direct the service Secretaries to fix basic compensation for overseas teachers "at rates *equal to*" average rates for similar employment in specified urban school districts in this country. 20 U.S.C. 903 (c) (Emphasis added). This change, however, was expressly made prospective only. See 80 Stat. 118.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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JOSEPH B. CRAWFORD, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

---

On Petition for a Writ of Certiorari to the United States Court of Claims

---

## PETITIONERS' REPLY BRIEF

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---

## PETITIONERS' REPLY BRIEF

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### I. The Issue of Discretion

The Government, following the decision of the Court below, argues that the 1959 Act "was cast in discretionary, not mandatory trems." It reasons that "the act spoke of setting pay scales 'in relation to' domestic levels, and in ordinary usage this standard includes more flexibility than the 'equal to' requirement petitioners would read into the statute." (Mem. in Opp., p. 5)

This argument totally ignores the mandatory language of the statute directing that "The Secretary . . . *shall fix* the rates of basic compensation of teachers and teaching positions . . . *in relation to* the rates of basic compensation for similar positions in the United

States." The statute expressly required the Secretary to fix rates in accordance with a specific statutory standard. It did not give the Secretary discretion to alter that standard, or to use another standard or criterion for setting teachers' salaries.

The Government's argument that the phrase "in relation to" cannot be construed to mean "equal to" is wholly beside the point. The issue in this case is not the meaning of the statutory phrase "in relation to," but whether the Secretary had authority, under the statute, to fix teachers' salaries "in relation to" some other criterion than that provided in the Act. Petitioners do not contend that the stautory phrase "in relation to" must be defined to mean "equal to." After all, teachers' salaries in the United States are not uniform; they vary from one school district to another. It would therefore have been absurd for Congress in 1959 to have provided that overseas teachers would be compensated at rates "equal to the rates of basic compensation for similar positions in the United States."[1]

---

[1] The 1966 legislation, of course, uses the phrase "equal to." But it does not employ the phrase "equal to the rates of basic compensation for similar positions in the United States." Rather, it adopts the formula developed by the Secretary of Defense under the 1959 Act, and provides that salaries shall be "equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school districts in the United States of 100,000 or more population."

In 1959, when the Act was written, there was no clear consensus with respect to a specific formula to be used in deriving a salary schedule for overseas teachers from the variety of salary schedules in effect in the United States. Therefore, in the Act Congress delegated the responsibility of developing such a formula to the Secretary of Defense.

It is precisely because United States teachers' salaries are not uniform that Congress used the phrase "in relation to" rather than "equal to." And it is for this same reason that Congress delegated to the Secretary of Defense the particular, limited authority to translate the statutory standard into specific salary figures.

In other words, the Act obviously gave the Secretary some discretion, but a discretion rigidly circumscribed by the mandatory terms of the statute. The Secretary was to determine, after consultation with appropriate teacher representatives, whether the salaries should be based upon the rates paid in a particular school district in the United States, or upon an average of the rates paid in all school districts, or selected school districts, or school districts falling within a particular population category, for example.[2] And in the exercise of *this* discretion, the Secretary decided that the appropriate standard would be the average (mean) of the rates of compensation in urban school jurisdictions of 100,000 population or over.

When the Secretary made that decision, he exhausted his statutory discretion. He had given content to the statutory standard by defining, through a concrete formula, the phrase "in relation to the rates of basic compensation for similar positions in the United States."

---

[2] "I think a fair interpretation is that the Secretary is to 'refer' to stateside salaries in the sense that a mariner might 'refer' to a chart. The chart does not tell the mariner where to go but tells him how to find his destination * * *. I think the Secretary was to ascertain stateside salaries and, in the light of his findings, was to fix compensation that was at least comparable." Nichols, J. dissenting below, Pet. p. 21a. See also p. 22a.

The issue in this case, therefore, is not whether "in relation to" means "equal to." Obviously, it does not. Nor is the issue whether the Act gives the Secretary *some* discretion. Obviously, it does. The issue is whether the Secretary could legally set salaries "in relation to" the so-called per pupil limitation—a standard not mentioned in the statute—rather than "in relation to the rates of basic compensation for similar positions in the United States"—the only standard provided in the Act.

### II. The Decision in Mitchell v. McNamara

The Government argues that the judgment of the Court below is supported by the decision of the District of Columbia Circuit in *Mitchell* v. *McNamara,* 352 F. 2d 700 (D.C. Cir. 1965). That case, however, was dismissed for lack of jurisdiction, without any determination on the merits.

At the time the *Mitchell* case was brought, the federal district courts did not have jurisdiction to adjudicate pay claims by Government employees. In an effort to avoid this jurisdictional problem, the plaintiffs in *Mitchell* sued for a writ of mandamus to require the Secretary of Defense to establish a salary schedule for overseas teachers which would be commensurate with the salaries paid to teachers in the United States. The Government, without filing an answer, moved to dismiss the action or, in the alternative, for summary judgment, on three grounds:

> "1. The plaintiffs lack standing to sue the United States and their complaint fails to state a justiciable controversy between plaintiffs and the United States;

> "2. This is an action against officers of the United States which constitutes an action against the United States to which the United States has not consented; and
>
> "3. The issuance of the mandamus prayed for in this action would be an unauthorized interference with the discretionary functions of the Executive officers of the United States and a judicial interference with the Executive Branch of Government in violation of the constitutional separation of powers." (Joint Appendix in *Mitchell* v. *McNamara,* D.C. Cir. No. 19,132, at pp. 12-13)

The plaintiffs cross-moved for summary judgment. The District Court then denied *both* motions for summary judgment, but dismissed the complaint for lack of jurisdiction. On appeal, the Court of Appeals affirmed, with a brief *per curiam* opinion in which it stated:

> "We think that the complaint was properly dismissed for lack of jurisdiction. In our view this is an unconsented suit against the United States; and in any case mandamus is not available because the courts will not interfere with the exercise of executive discretion in situations as confused and difficult as the present." 352 F. 2d at 701.

It is plain that the Court in the *Mitchell* case did not reach the merits of the controversy at all. Rather, it accepted the Government's argument that it lacked jurisdiction to adjudicate the controversy.

The fact that the court dismissed the complaint, and denied summary judgment, makes it clear that its decision cannot be construed as judicial approval of the Secretary's interpretation and administration of the Act. The dismissal of the complaint necessarily as-

sumed the truth of the plaintiffs' allegation that the Secretary of Defense had not properly carried out the requirements of the Act. Thus, the *Mitchell* decision stands only for the proposition that even if the teachers had not been paid the full salaries to which they were entitled, mandamus was not the appropriate remedy. It therefore has no bearing on the present case.

### III. The Issue of Periodic Adjustment

The Government argues that the salaries initially established under the 1959 Act "were generally commensurate with those paid in the United States" (Mem. in Opp. p. 2), and that the Act did not require periodic review and adjustment of these rates to keep pace with increases in salary levels in the United States. It asserts that "the statutes generally regulating the pay of federal civil servants contain no provision for mandatory increase in federal salaries to reflect a rise in comparable non-federal salaries," and that to read the 1959 Act as requiring such periodic adjustments would "confer preferred status on overseas teachers" (Mem. in Opp. p. 6).

This argument flies in the face of DoD's own interpretation of the statute. The very first rule laid down in the Salary Determination Procedures promulgated by DoD under the Act is:

> "1. *The compensation schedule will be reviewed annually.*" (Appendix B of Petition, at p. 31a)

The explanatory comment which follows this provision, after noting that "to date the Classification Act and some other white collar pay plans have not been reviewed annually," goes on to state that "it is custom-

ary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review." (*Ibid.*)

It is also clear that DoD, at the time the Wage Determination Procedures were promulgated, contemplated that there would be periodic increases in the salaries of overseas teachers. Thus, after the basic formula for computing these salaries, the following comment appears:

> "If teacher salaries continue to rise as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one or a few school districts grant increases. If it is not administratively feasible to reflect very small increases, a reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments." (*Id.* at 33a).

The Government's argument is therefore predicated on a misunderstanding of the facts. For it is indisputable that it was always understood by all concerned —even including DoD—that the statute contemplated that overseas teachers' salaries would be periodically adjusted so that their proper relationship with salaries paid to teachers in the United States would be maintained.

Nor can it fairly be said that this would confer a "preferred status" on overseas teachers, as the Government argues. In the first place, as the Secretary's

regulation quoted above recognizes, such periodic adjustments are customary whenever wages are tied to prevailing rates, as is the case, for example, of all blue-collar federal employees whose wages are set by "wage boards." See 5 U.S.C. §§ 5341-5343. Moreover, the wages of white collar classified employees, while not subject to automatic administrative increases, have been adjusted frequently by Congress in order to maintain approximate parity with non-governmental salary rates.[3]

Finally, the Government's argument must be rejected because it imputes to the Congress an intent which can only be described as positively malevolent. The Government's theory is that because Congress failed to increase the per pupil limitation in most of the years between 1959 and 1966, this must be taken to be an expression of Congress' intent to deny salary increases to the overseas teachers in those years. Since Congress repeatedly increased the salaries of all other federal employees in those very same years, this argument asks the Court to believe that Congress deliberately decided that although all of the millions of other federal employees were deserving of salary increases, the twenty thousand overseas teachers were not. Such an argument answers itself.

---

[3] As has already been demonstrated in the Petition, the salaries of classified federal employees as well as the salaries of United States teachers rose rapidly during the period 1959-1966, while the salaries of overseas teachers, as a result of DoD's administration of the Act, fell further and further behind (Pet., p. 13, including footnotes 17 and 18).

### IV. The Question of Acquiescence

The Government's Memorandum relies—as did the Court below—on the mistaken notion that the representatives of the overseas teachers acquiesced in DoD's interpretation and administration of the Act (Mem. in Opp. pp. 7-8; Pet. 16a-17a). Not only does this proposition have no support in the record but it also ignores the following stipulation, which is plainly to the contrary:

> "That when the plaintiffs and other teachers employed in the Overseas Dependents Schools were paid basic compensation at rates computed by the Department of Defense, subsequent to the enactment of P.L. 86-91, *they complained to defendant that such rates were less than the rates they were entitled to under said Act; such complaints were numerous and were made and continued from approximately the end of school year 1959-60 until the filing of the Petition herein.*" (Statement of Facts, Par. 14) (Emphasis added).[4]

That teachers or their representatives may have appeared before committees of the Congress to urge increases in the per pupil limitation does not negate this stipulation of record. The primary concern of the teachers was to obtain their proper salaries, and, since DoD had—despite their continued protests—made salary increases contingent upon increases in the per

---

[4] Judge Nichols, dissenting below, noted in this regard: "The government here was on notice that its interpretation of the statute was challenged, as it does not deny, and it continued to adhere to its position, without doing anything to clear the matter up. To my way of thinking, a long continued administrative practice is on a different footing when it has ignored an equally long-continued challenge to its legality * * *." (Pet. p. 27a).

pupil limitation, they also sought to persuade Congress to increase the per pupil limitation. Certainly their efforts in this regard did not constitute acquiescence in DoD's interpretation of the statute.

Nor is there any evidence that the Congress ever acquiesced in DoD's interpretation. As has already been demonstrated in the Petition (Pet., pp. 14-16), the legislative history of the 1966 amendments indicates precisely the opposite of acquiescence. And in the years between 1959 and 1966, the only relevant legislative history is found in a 1962 report of the House Appropriations Committee, which expressly states that in refusing to grant the full per-pupil limitation increase requested by the Secretary "the Committee is not indicating its disapproval of a bona fide, justified increase in the pay of overseas teachers." H.R. Rep. No. 1607, 87th Cong., 2d Sess. p. 29. The only inference which can be drawn is that Congress believed that DoD could meet its obligations to its teachers, and still run an effective school system, with the amounts appropriated.

### V. The Prospective Importance of This Case

The Government's final argument is that the question in this case is of no prospective importance because of the 1966 Amendment to the Act. There are two answers to this argument.

First, although there are approximately 20,000 overseas teachers who have claims under the 1959 Act, only 2,974 of them are involved in this case. Consequently, if e issue is not finally settled by this Court at this time, the Petitioners herein will be finally foreclosed

while the other 17,000 potential plaintiffs will still have the right to sue. Such suits can, of course, be brought in federal district courts which are not bound by the decision of the Court of Claims in this case. Indeed, a class action is already pending in the United States District Court for the Eastern District of Virginia. Thus, in order to avoid a wasteful multiplicity of litigation, as well as to avoid the inequity of conflicting results in different courts, the question should be finally settled by this Court at this time.

Second, the position which the Government has taken in this case may well affect the administration of the 1966 legislation. The Government's basic argument is that the Secretary complied with the 1959 Act by fixing overseas teachers salaries at levels which were *initially* commensurate with salaries in the United States, and that he had no obligation to keep pace with increases in United States salaries in the absence of sufficient annual appropriations. Obviously, this same argument could be made in the future, under the 1966 statute, if teachers' salaries in the United States rise faster than Congressional appropriations for the operation of overseas schools.

Stated otherwise, the basic question in this case is the relationship between substantive legislation and annual appropriations legislation, a question not unique to the 1959 Act. Indeed, in light of the very restrictive reading which the Government now seeks to place upon this Court's decisions in *United States* v. *Langston*, 118 U.S. 389 (1886), and *United States* v. *Vulte*, 223 U.S. 509 (1914), this problem is likely to recur with

considerable frequency in a variety of contexts if it is not settled finally in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 928

JOSEPH B. CRAWFORD, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for A Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, *AMICUS CURIAE*

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## BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, *AMICUS CURIAE*

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The National Education Association (NEA) respectfully submits this brief, as *amicus curiae,* in support of the Petition for Certiorari in this case. Both the Petitioners and the Solicitor General have consented to the filing of this brief.

## STATEMENT OF THE INTEREST OF THE NEA

The National Education Association is a non-profit educational and charitable corporation chartered by an Act of Congress in 1906. Its principal purpose, as described in its charter, is to "elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States." Its membership consists of more than one million educators, at all levels, including both teachers and school administrators. Most of the teachers who are or have been employed in the overseas dependents schools operated by the Department of Defense are members of an NEA affiliate, known as the Overseas Education Association (OEA).

The NEA has long been concerned with the problem which is now, finally, coming before the Court in this case. In 1957, NEA conducted a survey of its members employed in overseas schools, which revealed that they were greatly dissatisfied with their terms and conditions of employment. The results of this survey were brought to the attention of the Congress by the NEA in testimony presented before the House Committee on Appropriations in 1958. *Hearings on Defense Appropriations before a Subcommittee of the House Committee on Appropriations,* 85th Cong., 2d Sess. pp. 536-46 (1958). It was largely as a result of this testimony, as well as similar testimony presented by the Department of Defense (*id.* at 519), that Congress enacted reform legislation in 1959. That reform legislation, of course, was the Department of Defense Overseas Teachers Pay and Personnel Practices Act, under which the present case arises.

The NEA actively supported the 1959 Act, as did its affiliate, the OEA. After this legislation had been

adopted, representatives of NEA and OEA consulted with the appropriate officials of the Government concerning its implementation. (See Exhibit C to Def. Opp. to Mot. for Summary Judgment, p. 6).

Certainly neither the NEA nor the OEA would have supported the legislation if it had ever been anticipated that the statute would be utilized to intensify, rather than to remedy, the inequitable position of overseas teachers. The whole purpose of the legislation was to bring the terms and conditions of employment of overseas teachers in line with those prevailing in the United States.

When it became apparent that the Secretary of Defense was failing to administer the Act in a manner which would put the salaries of overseas teachers in parity with those in the United States, the NEA and the OEA strongly protested. When these protests were disregarded, these organizations joined with a group of individual teachers in an action brought in the United States District Court for the District of Columbia to compel the Secretary of Defense to set rates of compensation for overseas teachers at levels comparable to those in the United States, as the statute clearly required. This action was dismissed for lack of jurisdiction, and the dismissal was affirmed on appeal. *Mitchell* v. *McNamara,* 122 U.S. App. D.C. 224, 352 F. 2d 700 (D.C. Cir. 1965)

The NEA's continuing interest in this matter is not based merely on the fact that the rights of approximately 20,000 of its members are involved. The overseas schools of the Department of Defense constitute one of the largest of this country's school systems. The quality of that school system, of course, depends

ultimately on the quality of its teachers. And the ability of the Government to recruit qualified teachers will depend upon whether teachers believe that, if they accept such employment, they will receive fair treatment and adequate pay. The public interest in maintaining an able and continuing corps of teachers for the overseas school systems thus requires that the non-compliance with and maladministration of the 1959 Act be reviewed and rectified by this Court.

## ARGUMENT

The NEA respectfully urges the Court to grant the Petition for Certiorari in this case.

The issue before the Court, while growing out of a specific statute and its non-implementation, is a continuing one with important and long-range prospective implications, notwithstanding the enactment of other legislation in 1966. This case clearly raises the question of the legal obligation of a federal officer or agency *to attempt to comply* with applicable statutes. The statute here directed that the DoD "shall" fix salaries "in relation to the rates of basic compensation for similar positions in the United States . . ." Defendant's basic claim is that Congress failed to appropriate funds to meet this statutory standard, but that is not the real issue on the facts of this case. The prospective importance of this case is that it encompasses a failure or refusal of DoD even to request sufficient appropriations with which to comply with statutory obligations. Only in the first year after enactment of Public Law 86-91 did DoD even attempt to obtain adequate funds to meet the statutory level. Thereafter, by self-admission, DoD consistently failed and refused to request sufficient appropriations or to apply for supplemental

appropriations that would comply with the mandatory statutory standard (Defendant's Statement of Facts, par. 16(b)). Thus we have here a consistent pattern of deliberate and constant refusal to take the necessary ministerial steps to implement a mandatory statutory standard.

The decision below, by approving such culpable administrative action, gives legal sanction to what is both a negation of clear legislative intent and a breach of faith to a group intended to be protected by the statute. A contrary decision of this Court can prevent such subversion of other statutes applicable to plaintiff teachers (or to others). It is the method of alleged compliance with statutory obligations which is at stake here. Unless this Court rules otherwise, the decision of the Court below enshrines into precedent for all administrative agencies in numberless types of instances the means for evading statutory standards and mandates as well as an excuse for improperly laying to Congress a maladministration of law by administrative agencies. In these circumstances, this case clearly warrants review by this Court under Rule 19.

The Secretary of Defense, by ignoring his obligation to request adequate funds pursuant to law, in effect subsidized the operation of the overseas schools out of the salaries of the teachers. The net effect was to deny to teachers the salaries to which they were plainly entitled. Whatever rationalization is now advanced in defense of the Secretary's action, it cannot conceal the fact that the law provided one thing and the Secretary did another. It is impossible to reconcile the obligation to set teachers salaries "in relation to" stateside salaries and the Secretary's decision to set

them "in relation to" the per pupil limitation. This administrative decision was merely a formula to justify the Secretary's failure to request appropriations to the level mandated by statute, a clear and unequivocal violation of law.

This is not the time to argue the merits of the question in detail, since we support fully the arguments already before the Court in the Petition for Certiorari. We wish merely to inform the Court that the NEA, which was one of the original supporters of the 1959 Act, strongly believes that if the decision of the Court below is permitted to go unreviewed, teachers now employed overseas will be discouraged from remaining in Government service, and other teachers will be discouraged from accepting positions in it. The public interest in a stable and effective overseas education system will be severely impaired. In addition, a "pat" device for non-compliance with statutory mandates will be sanctioned and become applicable to other situations affecting plaintiff teachers as well as others.

It is noteworthy that the Government's opposition to certiorari in this case is based mainly on the argument that the decision below is correct. In these circumstances, a denial of certiorari will necessarily be construed as tacit approval of the manner in which the Secretary administered the Act. Since budgetary problems are always present in the Government, the refusal of the Court to review the decision in this case will encourage the Department of Defense, as well as other agencies, to take similar unlawful action in the future to solve a budgetary dilemma, by ignoring statutory mandates. Inadequate appropriations are a continuing problem in the administration of the ex-

ecutive departments and the threat continues to exist that the Secretary of Defense would once again seek to "adjust" the salaries of overseas teachers to meet budgetary exigencies. The 1966 amendments to the Act are no insurance against similar arbitrary action in the future, since presumably it could be argued that all the Secretary need do under the decision below is to refuse or fail to request appropriations pursuant to statutory requirement. The Secretary ignored the clear meaning and purpose of the 1959 legislation and he could as easily do the same under the new law. The issue of whether overseas teachers *must* be treated as the law provides continues to abide. So does the issue whether the Secretary must seek or attempt to comply with the law.

This festering problem can be promptly and finally resolved only by this Court. Accordingly, the NEA respectfully urges that the Petition for Certiorari be granted.

Respectfully submitted,

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